87-63

No.

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TED L. PERRYMAN*
JOHN L. WALKER
ROBERTS, PERRYMAN & BOMKAMP, P.C.
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850
Attorneys for Petitioners

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Appendix A - Opinion of Court of Appeals	A-1
Appendix B - Judgment of Court of Appeals	A-48
Appendix C - Order of Court of Appeals denying petition for rehearing	A-49
Appendix D - Memorandum Opinion of District Court	A-50
Appendix E - Order for final Judgment	A-109
Appendix F - Order of District Court denying motion to alter or amend judgment	A-112
Appendix G - Notice of Appeal	A-114
Appendix H - Notice of Cross-Appeal	A-115
Appendix I - Constitutional and statutory provisions involved	A-116

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1837

United States of America,
Appellee,

v.

Northeastern Pharmaceutical & Chemical Co., Inc.,
a Dissolved Delaware Corporation, Edwin Michaels
and John W. Lee,
Appellants.

Ronald Mills and Syntex Agribusiness, Inc.

No. 84-1853

United States of America,
Appellant,

v.

Northeastern Pharmaceutical & Chemical Co., Inc.,
a Dissolved Delaware Corporation, Edwin Michaels
and John W. Lee,
Appellees,

Ronald Mills and Syntex Agribusiness, Inc.

Appeal and Cross-appeal from
the United States District Court
for the Western District of Missouri

Submitted: March 25, 1985

Filed: December 31, 1986

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Northeastern Pharmaceutical & Chemical Co. (NEPACCO), Edwin Michaels and John W. Lee appeal from a final judgment entered in the District Court[1] for the Western District of Missouri finding them and Ronald Mills jointly and severally liable for response costs incurred by the government after December 11, 1980, and all future response costs relative to the cleanup of the Denney farm site that are not inconsistent with the national contingency plan (NCP) pursuant to §§ 104, 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.n§§ 9604, 9607 (appeal No. 84-1837). For reversal, appellants argue the district court erred in (1) applying CERCLA retroactively, (2) finding Michaels and Lee individually liable, (3) failing to dismiss NEPACCO as a party defendant, (4) awarding response costs absent affirmative proof that the response costs were consistent with the NCP, (5) refusing to reduce the award of response costs by the amount of a prior settlement, and (6) denying appellants a jury trial.

The United States cross-appeals from that part of the district court judgment denying recovery of response costs incurred before December 11, 1980, and finding appellants and Mills were not liable for response costs pursuant to § 7003(a) of the

[1] The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

Resource Conservation and Recovery Act of 1976 (RCRA) (also known as the Solid Waste Disposal Act), as amended, 42 U.S.C.A. § 6973(a) (West Supp. 1986) (appeal No. 84-1853). For reversal the government argues the district court erred in (1) finding the government could not recover response costs incurred before the effective date of CERCLA, December 11, 1980, and (2) finding appellants and Mills were not liable for response costs under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986).

For the reasons discussed below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

The following statement of facts is taken in large part from the district court's excellent memorandum opinion, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (*NEPACCO*). NEPACCO was incorporated in 1966 under the laws of Delaware; its principal office was located in Stamford, Connecticut. Although NEPACCO's corporate charter was forfeited in 1976 for failure to maintain an agent for service of process, NEPACCO did not file a certificate of voluntary dissolution with the secretary of state of Delaware. In 1974 its corporate assets were liquidated, and the proceeds were used to pay corporate debts and then distributed to the shareholders. Michaels formed NEPACCO, was a major shareholder, and was its president. Lee was NEPACCO's vice-president, the supervisor of its manufacturing plant located in Verona, Missouri, and also a shareholder. Mills was employed as shift supervisor at NEPACCO's Verona plant.

From April 1970 to January 1972 NEPACCO manufactured the disinfectant hexachlorophene at its Verona plant. NEPACCO leased the plant from Hoffman-Taff, Inc.; Syntex Agribusiness, Inc. (Syntex), is the successor to Hoffman-Taff.

Michaels and Lee knew that NEPACCO's manufacturing process produced various hazardous and toxic byproducts, including 2,4,5-trichlorophenol (TCP), 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD or dioxin), and toluene. The waste byproducts were pumped into a holding tank which was periodically emptied by waste haulers. Occasionally, however, excess waster byproducts were sealed in 55-gallon drums and then stored at the plant.

In July 1971 Mills approached NEPACCO plant manager Bill Ray with a proposal to dispose of the waste-filled 55-gallon drums on a farm owned by James Denney located about seven miles south of Verona. Ray visited the Denney farm and discussed the proposal with Lee; Lee approved the use of Mills' services and the Denney farm as a disposal site. In mid-July 1971 Mills and Gerald Lechner dumped approximately 85 of the 55-gallon drums into a large trench on the Denney farm (Denney farm site) that had been excavated by Leon Vaughn. Vaughn then filled in the trench. Only NEPACCO drums were disposed of at the Denney farm site.

In October 1979 the Environmental Protection Agency (EPA) received an anonymous tip that hazardous wastes had been disposed of at the Denney farm. Subsequent EPA investigation confirmed that hazardous wastes had in fact been disposed of at the Denney farm and the site was not geologically suitable for the disposal of hazardous wastes. Between January and April 1980 the EPA prepared a plan for the cleanup of the Denney farm site and constructed an access road and a security fence. During April 1980 the EPA conducted an on-site investigation, exposed and sampled 13 of the 55-gallon drums, which were found to be badly deteriorated, and took water and soil samples. The samples were found to contain "alarmingly" high concentrations of dioxin, TCP and toluene.

In July 1980 the EPA installed a temporary cap over the trench to prevent the entry and run-off of surface water and to minimize contamination of the surrounding soil and ground-

water. The EPA also contracted with Ecology & Environment, Inc., for the preparation of a feasibility study for the cleanup of the Denney farm site. Additional on-site testing was conducted. In August 1980 the government filed its initial complaint against NEPACCO, the generator of the hazardous substances; Michaels and Lee, the corporate officers responsible for arranging for the disposal of the hazardous substances; Mills, the transporter of the hazardous substances; and Syntex, the owner and lessor of the Verona plant, seeking injunctive relief and reimbursement of response costs pursuant to RCRA § 7003, 42 U.S.C. § 6973 (count I). In September 1983 the feasibility study was completed.

In the meantime the EPA had been negotiating with Syntex about Syntex's liability for cleanup of the Denney farm site. In September 1980 the government and Syntex entered into a settlement and consent decree. Pursuant to the terms of the settlement, Syntex would pay $100,000 of the government's response costs and handle the removal, storage and permanent disposal of the hazardous substances from the Denney farm site. The EPA approved Syntex's proposed cleanup plan, and in June 1981 Syntex began excavation of the trench. In November 1981 the site was closed. The 55-gallon drums are now stored in a specially constructed concrete bunker on the Denney farm. The drums as stored do not present an imminent and substantial endangerment to health or the environment; however, no plan for permanent disposal has been developed, and the site will continue to require testing and monitoring in the future.

In August 1982 the government filed an amended complaint adding counts for relief pursuant to CERCLA §§ 104, 106, 107, 42 U.S.C. §§ 9604, 9606, 9607 (counts II and III). CERCLA was enacted after the filing of the initial complaint. In September 1982 the district court granted partial summary judgment in favor of the government, holding NEPACCO had the capacity to be sued under Delaware law. In September 1983 the district court denied the defense demand for a jury trial, holding

the government's request for recovery of its response costs was comparable to restitution and thus an equitable remedy. The trial was conducted during October 1983. The district court filed its memorandum opinion in January 1984.

II. DISTRICT COURT DECISION

The district court found that dioxin, hexachlorophene, TCP, TCB (1,2,3,5-tetrachlorobenzene, also found at the Denney farm site), and toluene have high levels of toxicity at low-dose levels and are thus "hazardous substances" within the meaning of RCRA § 1004(5), 42 U.S.C. § 6903(5), and CERCLA § 101(14), 42 U.S.C. § 9601(14). 579 F. Supp. at 832, 845; *see also United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 874-79 (E.D. Ark. 1980) (dioxin). The district court also found there was a substantial likelihood that the environment and human beings would be exposed to the hazardous substances that had been disposed of at the Denney farm site. 579 F. Supp. at 846 & n.28 (discussing meaning of "imminent and substantial endangerment" standard). A state geologist testified the Denney farm site is located in an area in which substances rapidly move through the soil and into the groundwater and, although no dioxin had been found in the water in nearby wells, dioxin had been found as far as 30 inches beneath the soil in the trench. *Id.* at 832-33.

A. RCRA Findings

The district court held that RCRA § 7003(a), 42 U.S.C. § 6973(a), requires a finding of negligence in order to hold past off-site generators and transporters liable for response costs, *id.* at 836, and thus RCRA did not apply to past non-negligent off-site generators and transporters of hazardous substances. *Id.* at 834-37; *accord United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1258 (S.D. Ill. 1984); *United States v. Waste Industries, Inc.*, 556 F. Supp. 1301, 1308 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984); *United States v. Wade*, 546 F. Supp. 785, 790 (E.D. pa. 1982), *appeal dismissed*, 713 F.2d 49

(3d Cir. 1983); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 144 (N.D. Ind. 1980).

B. CERCLA Findings

CERCLA § 104, 42 U.S.C. § 9604, authorizes the EPA to take direct "response" actions, which can include either short-term "removal" actions or long-term "remedial" actions or both, pursuant to the NCP, with funds from the "Superfund,"[2] and to seek recovery of response costs from responsible parties pursuant to CERCLA § 107, 42 U.S.C. § 9607, in order to replenish the Superfund. The EPA can also use CERCLA § 106, 42 U.S.C. §9606, to seek injunctions to compel responsible parties to clean up hazardous waste sites that constitute an "imminent and substantial endangerment" to health and the environment. In the present case, count II sought injunctive relief pursuant to CERCLA § 106, 42 U.S.C. § 9606, and count III sought recovery of the government's past and future response costs pursuant to CERCLA §§ 104, 107, 42 U.S.C. §§ 9604, 9607.

The district court applied CERCLA retroactively, 579 F. Supp. at 839, but held the government could not recover response costs incurred before the effective date of CERCLA, December 11, 1980. *Id.* at 841. The district court also held CERCLA imposes a standard of strict liability, *id.* at 843-44, and that responsible parties can be held jointly and severally liable, *id.* at 844-45.

The district court also found NEPACCO liable as an "owner or operator" pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). *Id.* at 847. With respect to the individual defen-

---

[2] CERCLA establishes two funds: CERCLA § 232, 42 U.S.C. § 9641, establishes the Post-Closure Liability Trust Fund, which is funded through taxes on hazardous substances dispose of at qualified disposal facilities, and the "Superfund," or Haz rdous Substances Response Trust, which is funded largely by special taxes on the petroleum and chemical industries and also by general appropriations.

dants, the district court found Mills liable as a "person who . . . accepted any hazardous substances for transport to disposal . . . sites selected by such person," pursuant to CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). *Id.* Mills was not represented by counsel in the district court and has not appealed. The district court also found Lee liable as an "owner or operator" pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), and as a "person who by contract, agreement, or otherwise . . . arranged with a transporter for transport for disposal . . . of hazardous substances," pursuant to CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). *Id.* at 847-49. The district court found Michaels liable as a person who arranged for the transport and disposal of hazardous substances pursuant to CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). *Id.* at 849 n.31. The liability of NEPACCO, Lee, Michaels, and Mills was joint and several. *Id.* at 849-50.

The district court further found the government's right to recovery of response costs was very broad and included litigation costs, attorney's fees, future response costs, and prejudgment interest, and that the defendants in an action by the government for recovery of response costs had the burden of proving that the government's response costs were inconsistent with the NCP. *Id.* at 850-52. NEPACCO, Michaels and Lee have appealed. Mills has not appealed. The government filed a cross-appeal. Syntex filed an amicus curiae brief, generally in support of appellants' retroactivity arguments.[3]

---

[3] We do not consider in this appeal and cross-appeal the arguments raised by Syntex about causation, strict liability, joint and several liability, and separation of powers. Syntex, as amicus, cannot raise issues not raised by the parties. *See, e.g., preservation Coalition, Inc. v. Pierce,* 667 F.2d 851, 861-62 (9th Cir. 1982); *Bing v. Roadway Express, Inc.,* 485 F.2d 441, 452 (5th Cir. 1973). Most cases have imposed strict liability and joint and several liability under RCRA and CERCLA. *See, e.g., United States v. Ottati & Goss, Inc.,* 630 F. Supp. 1361, 1395-96, 1401 (D.N.H. 1985); *United States v. Conservation Chemical Co.,* 619 F. Supp. 162, 191, 198-99, 204 (W.D. Mo. 1985); *United States v. Chem-Dyne Corp.,* 572 F. Supp. 802, 808-11 (S.D. Ohio 1983). *See also Developments in the Law— Toxic Waste Litigation,* 99 Harv. L. Rev. 1498, 1517-43 (1986).

III. CERCLA— RETROACTIVITY

A. Application of CERCLA to Pre-1980 Acts.

Appellants first argue the district court erred in applying CERCLA retroactively, that is, to impose liability for acts committed before its effective date, December 11, 1980. CERCLA § 302(a), 42 U.S.C. § 9652(a), provides that "[u]nless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980." Appellants argue that CERCLA should not apply to pre-enactment conduct that was neither negligent nor unlawful when committed. Appellants argue that all the conduct at issue occurred in the early 1970s, well before CERCLA became effective. Appellants also argue that there is no language supporting retroactive application in CERCLA's liability section, CERCLA § 107, 42 U.S.C. § 9607, or in the legislative history. Appellants further argue that because CERCLA imposes a new kind of liability, retroactive application of CERCLA violates due process and the taking clause. We disagree.

The district court correctly found Congress intended CERCLA to apply retroactively. *Id.* at 839. We acknowledge there is a presumption against the retroactive application of statutes. *See United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982). We hold, however, that CERCLA § 302(a), 42 U.S.C. § 9652(a), is "merely a standard 'effective date' provision that indicates the date wnen an action can first be brought and when the time begins to run for issuing regulations and doing other future acts mandated by the statute." *United States v. Shell Oil Co.,* 605 F. Supp. 1064, 1075 (D. Colo. 1985); *cf. Von Allmen v. Connecticut Teachers Retirement Board,* 613 F.2d 356, 359-60 (2d Cir. 1979) (veterans statute).

Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. The language used in the key liability provision, CERCLA § 107, 42 U.S.C. § 9607, refers to actions

and conditions in the past tense: "any person who at the time of disposal of any hazardous substances owned or operated," CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), "any person who . . . arranged with a transporter for transport for disposal," CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and "any person who . . . accepted any hazardous substances for transport to . . . sites selected by such person," CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). *See, e.g., United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 220 (W.D. Mo. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. at 1069-73; *United States v. South Carolina Recycling & Disposal, Inc.*, 20 EnvRt Rep. Cases (BNA) 1753, 1760-62 (D.S.C. 1984)[4]; *United States v. A & F Materials Co.*, 577 F. Supp. at 1259; *United States v. Price*, 577 F. Supp. 1103, 1111-12 (D.N.J. 1983); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983); *United States v. Outboard Marine Corp.*, 556 F. Supp. 54, 57 (N.D. Ill. 1982); *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1113-14 (D. Minn. 1982); *see generally Developments in the Law— Toxic Waste Litigation*, 99 Harv. L. Rev. 1498 (1986) (*Developments*).

Further, the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to clean up inactive or abandoned hazardous substance sites, CERCLA § 106, 42 U.S.C. § 9606, and authorizes federal, state and local governements and private parties to clean up such sites and then seek recovery of their response costs from responsible parties, CERCLA §§ 104, 107, 42 U.S.C. §§ 9604, 9607. In order to be effective, CERCLA

---

[4] The court in *United States v. South Carolina Recycling & Disposal, Inc.*, 20 Env't Rep. Cases (BNA) 1753, 1760 (D.S.C. 1984), noted CERCLA does not apply "retroactively" because it does not impose liability for past conduct; rather, CERCLA imposes liability upon those parties responsible for causing certain conditions, that is, the release or threatened release or hazardous substances, that are the *present or future* results of their *past* actions.

must reach past conduct. CERCLA's backward-looking focus is confirmed by the legislative history. *See generally* H.R. Rep. No. 1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119 (CERCLA House Report). Congress intended CERCLA "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *Id.* at 22, 1980 U.S. Code Cong. & Ad. News at 6125.

The district court also correctly found that retroactive application of CERCLA does not violate due process. 579 F. Supp. at 840-41. Appellants argue CERCLA creates a new form of liability that is designed to deter and punish those who, according to current standards, improperly disposed of hazardous substances in the past. We disagree.

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (citations omitted). Due process is satisfied "simply by showing tht the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Id.* at 729.

Appellants failed to show that Congress acted in an arbitrary and irrational manner. Cleaning up inactive and abandoned hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole, *NEPACCO,* 579 F. Supp. at 841. *See United States v. Ottati & Goss, Inc.,* 630 F. Supp. 1361, 1398-99 (D.N.H. 1985); *United States v. Conservation Chemical Co.,* 619 F. Supp. at 221-22; *United States v. Shell Oil Co.,* 605 F. Supp. at 1072-73; *United States v. South Carolina Recycling & Disposal, Inc.,* 20 Env't Rep. Cases (BNA) at 1761-62; *see generally Developments,* 99 Harv. L. Rev. at 1556-62. We hold retroactive application of CERCLA to impose liability upon responsible parties for acts committed before the effective date of the statute does not violate due process.

Appellants also summarily argue retroactive application of CERCLA constitutes an unconstitutional taking of property. We disagree. First, because appellants do not have a property interest in the Denney farm site, we question appellants' standing to raise a taking issue. Second, we hesitate to characterize the government's cleanup as a taking at all; the government's cleanup of the Denney farm site has not deprived the property owner of any property interest. *See United States v. Conservation Chemical Co.,* 619 F. Supp. at 216-17. Instead, the government's cleanup of the site abated an "imminent and substantial endangerment" to the public health and the environment, thus eliminating a public nuisance and restoring value to the property by removing the hazardous substances. *See generally Developments,* 99 Harv. L. REv. at 1564-65 & nn.111, 114, *citing* Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?,* 12 B.C. Envtl. Aff. L. Rev. 1, 43-46 (1985).

B. Application of CERCLA to Pre-1980 Costs

Related to the question of CERCLA's application to pre-1980 acts is the question whether the government can recover response costs incurred prior to CERCLA's effective date. This issue is raised by the government's cross-appeal. The district court held that the government could not recover its pre-enactment response costs. *NEPACCO,* 579 F. Supp. at 841-43. The government argues on cross-appeal that the district court erred in denying the government recovery of its pre-CERCLA response costs. The government argues a close examination of the statutory language and scheme, legislative history and legislative purpose supports retroactive liability for pre-enactment response costs.

The district court concluded that because of the magnitude of the potential liability for pre-enactment response costs, "it is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports or floor debates." *Id.* at 843; *accord United States v. Wade,* 20 Env't Rep. Cases (BNA) 1849, 1850-51 (E.D. Pa. 1984). The district court found that CERCLA itself did not clearly specify whether pre-enactment response costs were recoverable because the "statutory language 'all costs . . . incurred' [in CERCLA § 107(a),] 42 U.S.C. § 9607(a), is susceptible to varying interpretations, either all costs incurred regardless of when incurred or all costs incurred from the date of enactment." *Id.* at 842. The district court noted that "[t]he [NCP] makes no provision for the recovery of pre-CERCLA response costs," *id., citing* 40 C.F.R. Part 300 (1983), and that the "time limitations placed in sections 104(c)(3), 107(f) and 111(d)(1) [,42 U.S.C. §§ 9607(c)(3), (f), 9677(d),] could equally indicate that these are the only provisions in which pre-CERCLA costs may be recoverable." *Id.* The district court also found the legislative history "unpersuasive" because recovery of pre-CERCLA response costs was not discussed at all in the

House, *id.* at 843 n.21, and the only references to authority to recover pre-CERCLA response costs in the Senate, § 4(a))2) and § 4(n) of S. 1480, were deleted and not enacted. *Id.* at 843.

After the present case was decided, this issue was exhaustively examined and resolved in favor of recovery of pre-CERCLA response costs in *United States v. Shell Oil Co.*, 605 F. Supp. at 1072-79. We find the analysis in *United States v. Shell Oil Co.* to be convincing. *Accord Mayor of Boonton v. Drew Chemical Corp.*, 621 F. Supp. 663, 668-69 (D.N.J. 1985); *United States v. Ward*, 618 F. Supp. 884, 989-99 (E.D.N.C. 1985).

In *United States v. Shell Oil Co.* the federal government sued under CERCLA §§ 104, 107, 42 U.S.C. §§ 9604, 9607, to recover the costs it had incurred and will incur in cleaning up the heavily contaminated Rocky Mountain Arsenal located outside of Denver, Colorado. The Rocky Mountain Arsenal has been owned by the United States since 1942 and was used by the United States Department of the Army for manufacturing and handling various chemicals and munitions. In addition, since 1947, Shell Oil and its predecessors had leased part of the Arsenal for the manufacture of pesticides, herbicides and other chemicals. The Army's wastes and all or some of Shell's wastes were disposed of through waste disposal systems built and operated by the Army. The waste disposal systems repeatedly failed and released the commingled wastes into the environment, severely contaminating the Arsenal and threatening the surrounding environment. In 1975 the Army began to clean up the Arsenal. By December 1, 1983, before CERCLA was enacted, the Army had incurred about $48 million in response costs and, by January 1984, had proposed four alternative cleanup programs, with estimated future response costs ranging from $210 million to $1.8 billion, and recommended the program estimated to cost $360 million. Shell argued, among other things, that CERCLA did not authorize recovery of the Army's pre-enactment response costs.

The *Shell Oil* court disagreed and held CERCLA authorized recovery of pre-enactment response costs. 605 F. Supp. at 1079. First, the *Shell Oil* court agreed with the district court in the present case that "congressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from the verb tenses in [CERCLA] § 107)a) [,42 U.S.C. § 9607(a)]." *Id.* at 1073. The *Shell Oil* court examined the grammatical structure of CERCLA § 107(a), 42 U.S.C. § 9607(a), and concluded hat each party's argument cancelled the other out. *Id., citing Ohio ex rel. Brown v. Georgeoff,* 562 F. Supp. at 1309-10. Shell had argued that "use of the imperative 'shall' . . . indicate[d] [that Congress] intended prospective operation of the liability provision." 605 F. Supp. at 1073. The government had argued, however, that "all the other verbs in [CERCLA] § 107(a) [, 42 U.S.C. § 9607(a),] including 'costs . . . incurred,' [were] in the past tense (with the exception of 'accepts'). . . . [and thus should] be interpreted to include pre-enactment events." *Id.*

The *Shell Oil* court did not address the NCP's failure to provide for recovery of pre-CERCLA response costs. The *Shell Oil* court, however, considered and rejected the related argument that the requirement in CERCLA § 107(a), 42 U.S.C. § 9607(a), that recoverable costs were those costs "not inconsistent with the [NCP]" indicated Congress' intent that liability for costs was prospective only. The *Shell Oil* court concluded the "[t]he consistency requirement addresses the *nature* of the response action for which costs can be recovered, not the *timing* of the action." *Id.* at 1074. The *Shell Oil* court also refused to interpret the effective date provision, CERCLA § 302(a), 42 U.S.C. § 9652(a), to limit liability to pre-enactment response costs. *Id.* at 1075.

Because CERCLA §§ 107(c)(3), 107(f) and 111(d), 42 U.S.C. §§ 9607(c)(3), (f), 9611(d), contain express time limitations, the absence of any time limitations in CERCLA § 107(a), 42 U.S.C. § 9607(a), arguably supports only prospective liability for

response costs. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3), provides a state with a credit against its share of future maintenance costs for its documented cleanup costs expended after January 1, 1978 and before December 11, 1980, for CERCLA § 111, 42 U.S.C. § 9611, actions. This provision specifies the funding relationship between the federal government and individual states for future maintenance costs and does not address whether the government can recover pre-CERCLA response from responsible parties.

CERCLA § 107(a)(4)(A)-(C), 42 U.S.C. § 9607(a)(4)(A)-(C), sets forth three types of liability: (A) response costs incurred by the United States or a state that are not inconsistent with the NCP, (B) any other necessary response costs incurred by any other person that are consistent with the NCP, and (C) natural resource damages. By separately considering the place of each type of liability in the statutory scheme, we can discern Congressional intent with respect to recovery of pre-enactment response costs. CERCLA §§ 107(f), 111(d)(1), 42 U.S.C. §§ 9607(f), 9611(d)(1), preclude recovery of natural resource damages and claims for such damages against the Superfund if the release of hazardous substances and the resulting natural resource injury occurred wholly before CERCLA's enactment. The *Shell Oil* court noted the provisions authorizing recovery of response costs by the government, CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), and by any other person, CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), do not contain time limitations and decided "[i]n order to give meaning to these [time limitation] provisions [in CERCLA §§ 107(f), 111(d)(1), 42 U.S.C. §§ 9607(f), 9611(d)(1)], one must assume that liability for other damages — costs of removal or remedial action incurred by the United States or a State (§ 107(a)(4)(A)), and other necessary response costs incurred by any other person (§ 107(a)(4)(B)) — is not so limited." 605 F.Supp. at 1076. Thus, the *Shell Oil* court concluded "Congress implicitly authorized retroactive application of sections 107(a)(4)(A) and (B) by affirmatively limiting retroactive application of the third category of

liability, damages to natural resources, section 107(a)(4)(C)." *Id. Cf. United States v. Conservation Chemical Co.* 619 F. Supp. at 213 (three year statute of limitations in CERCLA § 112(d), 42 U.S.C. § 9612(d), applies only to claims against the Superfund and for natural resource damages), *citing United States v. Mottolo,* 605 F. Supp. 898, 901-10 (D.N.H. 1985).

As further explained by the *Shell Oil* court

> [t]here is good reason to preclude use of CERCLA monies and liability for cleanup of sites where both the release and the damages occurred wholly before enactment. The sites excluded under 107(f) and 111(d) are stable sites, that is, the environment, though damaged, will not deteriorate further. . . . Congress apparently decided to utilize the limited resources of the fund created by CERCLA to clean up the thousands of sites. . . which are not stable. CERCLA's goal is to clean up these sites before further damage occurs.
>
> At the opposite end of the spectrum from the stable sites excluded under 107(f) and 111(d) are those sites. . . where the danger to the public health and welfare and to the environment was so imminent that the United States proceeded with cleanup without a special fund of money for that purpose and without assurance that it would be repaid by the persons responsible for the contamination. It was sites containing this magnitude of public danger that prompted Congress to enact CERCLA.
>
> Construing section 107(a) to preclude recovery of pre-enactment response costs would carve out an exception to the general retroactive scheme of the statute for those most severe situations where. . . the government's response commenced prior to the enactment of the statute. . . . Congress could [not] have intended to protect the public fisc by imposing liability on the responsible parties, yet except the sites where response had already commenced because the

> situations were the most imminently threatening. Such an interpretation would penalize the government for prompt response and provide an undeserved windfall to the parties who had created, then abandoned, some of the most egregious sites.

605 F. Supp. at 1076-77.

The *Shell Oil* court then reviewed the legislative history of CERCLA, including the treatment of § 4(a)(2) and § 4(n) of S. 1480, and concluded it supported imposing liability for pre-enactment response costs. *Id.* at 1077-79. The legislative history of CERCLA is very difficult to follow, in part because

> [t]wo different bills proceeded through the House and the Senate. The Senate made certain last minute amendments to its bill, (S. 1480, 96th Cong., 2d Sess. 1980), most notably the removal of provisions imposing liability for personal injury caused by hazardous waste disposal. The House then struck the language in its bill, H.R. 7020, 96 Cong.2d Sess. (1980), and substituted the language of the Senate bill. H.R. 7020, as amended, was eventually enacted. The bill retained the House file number, apparently because of a requirement that appropriations measures originate in the House.

United States v. Reilly Tar & Chemical Corp., 546 F. Supp. at 1111. As explained by the *Shell Oil* court

> [t]he liability provisions of CERCLA were derived largely from the original Senate bill, S. 1480. S. 1480 contained a liability provision for both costs of removal (§ 4(a)(1)) and for natural resources, property and personal injury damages (§ 4(a)(2)). During discussions of S. 1480 in the Senate Committee on Environment and Public Works, concern was expressed about retroactive application of the bill.... Senator Domenici introduced a new § 4(n) which limited recovery for pre-enactment damages recoverable under § 4(a)(2).

. . .

> Significantly, § 4(n)(1) did not apply to § 4(a)(1) which provided liability for response costs. The Senate report [at 37] emphasized the limited scope of § 4(n): . . . "Costs of removal (cleanup and containment) are not affected by this provision, nor are any damages associated with continuing releases."

605 F. Supp. at 1077-78. As noted by the district court in the present case, both § 4(a)(2) and § 4(n) were deleted from the enacted bill. 579 F. Supp. at 843. We agree with the *Shell Oil* court, however, that the deletion of these subsections in fact indicates Congress intended to permit recovery of pre-CERCLA response costs because

> [t]he time limitations on damages added by § 4(n) of S. 1840 were maintained in the final version of CERCLA as the §§ 107(f) and 111(d) limitations on recovery of natural resources damages. The remaining time limitations of § 4(n) were deleted only because the substantive liability provisions for property and personal injury damages [in § 4(a)(2)] were deleted from the statute. Thus, the scheme of § 4(n) in limiting recovery for pre-enactment *damages, but not response costs,* was maintained in the final statute. The legislative history of § 4(n), including the comments emphasizing that recovery of removal costs is not to be limited by retroactivity concerns, therefore applies to the statute as passed.

605 F. Supp. at 1079 (emphasis added).

In summary, we hold the district court erred in finding that CERCLA does not authorize recovery of pre-enactment response costs. That part of the district court judgment holding that pre-enactment response costs cannot be recovered is reversed.

IV. RCRA

A. Standard and Scope of § 7003 Liability

As an alternative basis for recovery of the response costs incurred before December 11, 1980, the government argues on cross-appeal that it can also recover its response costs pursuant to RCRA § 7003(a), 42 U.S.C.A. § 9673(a) (West Supp. 1986). The district court did not reach the recovery issue because it held that under RCRA § 7003(a), 42 U.S.C. § 6973(a) (prior to 1984 amendments discussed below), proof of fault or negligence was required in order to impose liability upon past off-site generators and transporters. 579 F. Supp. at 834-37. Because the government did not allege or prove negligence, the district court found no liability under RCRA § 7003(a), 42 U.S.C. § 9673(a) (prior to 1984 amendments). *Id.* at 837. The government argues that the standard of liability under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), as initially enacted and as amended in 1984, is strict liability, not negligence, and that liability under RCRA can be imposed even though the acts of disposal occurred before RCRA became effective in 1976. We agree.

RCRA was initially enacted in 1976, Pub. L. No. 94-580, 90 Stat. 2826 (1976), and was amended in 1978, Pub. L. No. 95-609, 92 Stat. 3083 (1978), and 1980, Pub. L. No. 96-482, 92 Stat. 2348 (1980). In November 1984, after the district court's January 1984 decision in the present case, RCRA was again amended by the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3271 (1984) (1984 amendments). We have considered the 1984 amendments and the accompanying legislative history and, for the reasons discussed below, we believe the 1984 amendments support the government's arguments about RCRA's standard and scope of liability and retroactivity.

The critical issue is the meaning of the phrase "contributing to." Before its amendment in 1984, RCRA § 7003(a), 42

U.S.C. § 6973(a), imposed liability upon any person "contributing to" "the handling, storage, treatment, transportation or disposal of any solid or hazardous waste" that "may present an imminent and substantial endangerment to health or the environment." The district court did not find either the statutory language or the statutory framework helpful in determining whether past non-negligent off-site generators and transporters were liable under RCRA § 7003(a), 42 U.S.C. § 6973(a) (prior to the 1984 amendments). 579 F. Supp. at 834. The district court then considered the legislative history of the 1980 amendments, *id.* at 835-36, because "[t]he legislative history of the [RCRA] as originally enacted contains no specific discussion of the reach of section 7003 and no mention of the reasons for its insertion. The hastiness of the [RCRA's] passage in the final days of a congressional session has been well-documented." *United States v. Waste Industries, Inc.* 734 F.2d 159, 165 (4th Cir. 1984), *citing* Kovacs & Klucsik, *The New Federal Role in Solid Waste Managemet: The Resource Conservation & Recovery Act of 1976,* 3 Colum. J. Envtl. L. 205, 216-20 (1976).

The district court found two apparently contradictory references in the legislative history. The report on Hazardous Waste Disposal issued by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, H.R. Comm. Print No. IFC 31, 96th Cong., 1st Sess. 31 (1979) (the Eckhardt Report), stated that "a company that generates hazardous waste would be someone 'contributing to' an endangerment under § 7003, even where someone else deposited the waste in an improper disposal site similar to strict liability under common law." The strict liability language in the Eckhardt Report, however, was not adopted later in the Senate Report, which stated

> a company that generated hazardous waste might be someone "contributing to" air endangerment under section 7003 even where someone else deposited the waste in an improper disposal site (similar to strict liability under common law), where the generator had knowledge of the illicit

> disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.

S. Rep. No. 172, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5019, 5023. The district court resolved the battle between the conflicting legislative references in favor of the Senate Report and held that the language in the Senate Report "would suggest strict liability of present responsible landowners, but the qualifying phrases 'illicit disposal or failed to exercise due care' requires a finding of negligence prior to holding past off-site generators or transporters liable." 579 F. Supp. at 836; *accord United States v. Waste Industries, Inc.*, 556 F. Supp. at 1308; *United States v. Wade,* 546 F. Supp. at 790. *But see, e.g., United States v. Reilly Tar & Chemical Corp.* 546 F. Supp. at 1108; *United States v. Price,* 523 F. Supp. 1055, 1070-71 (D.N.J. 1981), *aff'd,* 688 F.2d 204 (3d Cir. 1982); *United States v. Diamond Shamrock Corp.,* 17 Env't Rep. Cases (BNA) 1329, 1333-34 (N.D. Ohio 1981); *United States v. Solvents Recovery Service,* 496 F. Supp. 1127, 1139 (D. Conn. 1980).

Then, in November 1984, Congress passed and President Reagan signed the 1984 amendments, which were described as "clarifying" amendments and specifically addressed the standard and scope of liability of § 7003(a). As amended in 1984, RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986) (new language underlined; deleted language in brackets), now provides in pertinent part:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the *past or present* handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court [to immediately restrain any person] *against any person (including any past or present generator, past or present transporter, or past or*

> *present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is* contributing to such handling, storage, treatment, transportation or disposal [to stop] *to reatrain such person from* such handling, storage, treatment, transportation, or disposal [or to take such other action as may be necessary], *to order such person to take such other action as may be necessary, or both.*

As amended, RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), specifically applies to *past* generators and transporters. *See United States v. Ottari & Gross, Inc.* 630 F. Supp. at 1400 (applying RCRA as amended in 1984); *United States v. Conservation Chemical Co.*, 619 F. Supp. at 217-18 (applying RCRA as amended in 1984).

Congress' intent with respect to the standard of liability under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), as amended by the 1984 amendments, is clearly set forth in the accompanying House Conference Report.[5] The House Con-

---

[5] The earlier House Report also stated:

> [t]hese amendments are intended to clarify the breadth of Section 7003 as to the persons, conditions and acts it covers. The amendments clearly provide that anyone who *has contributed* or is contributing to the creation, existence, or maintenance of an imminent and substantial endangerment is subject to the equitable authority of Section 7003, *without regard to fault or negligence.* Such persons include, but are not limited to, *past and present generators (both off-site and on-site) of hazardous wastes,* past and present owners and operators of waste treatment, storage, or disposal facilities, and *past and present transporters of solid or hazardous wastes.* In addition, Section 7003 is clarified to establish that it applies to *any act, whether past or present,* which has resulted in or may result in an imminent and substantial endangerment to public health or the environment....
>
> As evidenced by the definition of "disposal" in Section 1004(3), which includes the "leaking" of hazardous wastes, Section 7003 has always provided the authority to require the abate-

ference Report also expressly disapproved of the *Wade* and *Waste Industries* cases, which were relied upon by the *NEPACCO* court, as well as the *NEPACCO* decision itself. The House Conference Report stated:

> ment of *present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional*....
>
> Moreover, because Section 7003 focuses on the abatement of conditions threatening health and the environment and not a particular human activity, it has *always reached those persons who have contributed in the past or are presently contributing to the endangerment, including but not limited to generators, regardless of fault or negligence.* The amendment, by adding the words "have contributed" is merely intended to clarify the existing authority. Thus, for example, *non-negligent generators whose wastes are no longer being deposited or dumped at a particular site may be ordered to abate the hazard to health or the environment posed by the leaking of wastes they once deposited or caused to be deposited on the site.* The amendment reflects the long-standing view that generators and other persons involved in the handling, storage, treatment, transportation, or disposal of hazardous wastes must share in the responsibility for the abatement of the hazards arising from their activities.
>
> In addition, due to the nature of the hazards presented by disposal sites , Section 7003 is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." *United States v. Price,* 688 F.2d 204, 213-14 (3d Cir. 1982). The section was intended and is intended to abate conditions resulting from *past* activities. Hence, the lower court decisions in *United States v. Wade,* 546 F. Supp. 785 (E.D. Pa. 1982), and *United States v. Waste Industries, Inc.,* No. 80-4-Civ-7 (E.D.N.C. 1983), which restricted the application of Section 7003, are inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments.

H.R. Rep. No. 198 (Part I), 98th Cong., 2d Sess. 47-49 (1983) (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Ad. News 5576, 5606-09 (emphasis added).

> Section 7003 focuses on the abatement of conditions threatening health and the environment and not particularly human activity. Therefore, it has *always reached those persons who have contributed in the past or are presently contributing to the endangerment, including but not limited to generators, regardless of fault or negligence.* The amendment, by adding the words "have contributed" is merely intended to clarify the existing authority. Thus, for example, *non-negligent generators whose wastes are no longer being deposited or dumped at a particular site may be ordered to abate the hazard to health or the environment posed by the leaking of the wastes they once generated and which have been deposited on the site.* The amendment reflects the long-standing view that generators and other persons involved in the handling, storage, treatment, transportation or disposal of hazardous wastes must share in the responsibility for the abatement of the hazards arising from their activities. The section was intended and is intended to abate conditions resulting from past activities. Hence, the district court decisions in *United States v. Wade,* 546 F. Supp. 785 (E.D. Pa. 1982), *United States v. Waste Industries, Inc.,* No. 80-4-Civ-7 (E.D.N.C. 1983), and *United States v. Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823 (W.D. Mo. 1984), which restricted the application of section 7003, are inconsistent with the authority conferred by the section as initially enacted and with these clarifying amendments.

H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 119 (1984) (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Ad. News 5649, 5690 (emphasis added).

Thus, following the 1984 amendments, past off-site generators and transporters are within the scope of RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986). From the legislative history of the 1984 amendments, it is clear that Congress intended RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West

Supp. 1986), as initially enacted and as amended, to impose liability without fault or negligence and to apply to the present conditions resulting from past activities. In other words, RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), as initially enacted and as amended, applies to past non-negligent off-site generators like NEPACCO and to non-negligent past transporters like Mills. *See United States v. Ottati & Goss, Inc.*, 630 F. Supp. at 1400-01 (applying RCRA as amended in 1984), *citing United States v. Hardage,* 18 Env't Rep. Cases (BNA) 1685, 1686 (W.D. Okla. 1982) (RCRA as amended in 1980); *United States v. Conservation Chemical Co.*, 619 F. Supp. at 198.

Appellants argue, however, that the 1984 amendments should not be applied to them because the 1984 amendments are not merely "clarifying" amendments but instead substantively changed the existing law. We disagree. First, Congress itself expressly characterized the 1984 amendments as "clarifying" amendments. Second, as part of the legislative history of the 1984 amendments, Congress expressly stated what its intention had been when it initially passed the RCRA in 1976, even though the 1976 legislative history contained no specific discussion of the standard and scope of liability of § 7003(a).

> Although this is not legislative history as such, the views of subsequent Congresses on the same or similar statutes are entitled to some weight in the construction of previous legislation. Although the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, this is not a problem in this case because there was no absolutely "unmistakable intent" of Congress concerning section 7003. To the extent that the precise intent of the enacting Congress may be obscure, the views of subsequent Congresses should be given greater deference than they would be otherwise entitled to receive.

United States v. Waste Industries, Inc., 734 F.2d at 166 (discussing legislative history of 1980 RCRA amendments) (citations

omitted); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Thus, by passing the 1984 amendments, the 98th Congress made clear that the intention of the 94th Congress in enacting the RCRA in 1976 had been to impose liability upon past non-negligent off-site generators and transporters of hazardous waste.

B. Retroactivity

This argument is closely related to the question of the scope of § 7003(a) liability discussed above. Appellants argue that because RCRA, unlike CERCLA, is prospective in focus and was not enacted until 1976, RCRA cannot be retroactively applied to impose liability on them for acts that occurred in 1971. A similar retroactivity argument was raised in *United States v. Price*, 523 F. Supp. at 1071-72. The defendants in *United States v. Price* had argued that RCRA could not be applied retroactively to impose liability on them for disposing of toxic wastes in 1972. The *Price* court rejected the retroactivity argument, stating

> [t]he gravamen of a section 7003 action . . . is not defendants' dumping practices, which admittedly ceased with respect to toxic wastes in 1972, but the present imminent hazard posed by the continuing disposal [, which is defined by RCRA § 1003(3), 42 U.S.C. § 6903(3), to include "[t]he . . . leaking . . . of any solid waste or hazardous waste into or on any land or water,"] of contaminants into the groundwater [or into the environment]. Thus, the statute neither punishes wrongdoing nor imposes liability for injuries inflicted by past acts. Rather, as defendants themselves argue, its orientation is essentially prospective. When construed in this manner, the statute is simply not retroactive. It merely relates to current and future conditions.

Id. at 1071; *accord United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cases (BNA) at 1333-34; *cf. United States v.*

South Carolina Recycling & Disposal, Inc., 20 Env't Rep. Cases (BNA) at 1760-61 (similar analysis of CERCLA). We hold RCRA is not retroactive because it imposes liability for the *present and future* conditions resulting from past acts. *But cf. United States v. Conservation Chemical Co.*, 619 F. Supp. at 220-22 (holding RCRA should be considered a retroactive law, but finding no due process violation).

In summary, we hold that RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), as initially enacted and as clarified by the 1984 amendments, imposes strict liability upon past off-site generators of hazardous waste and upon past transporters of hazardous waste. We reverse that part of the district court judgment holding that RCRA does not apply to past non-negligent off-site generators and transporters.

V. SCOPE OF LIABILITY

The district court found NEPACCO liable as the "owner or operator" of a "facility" (the NEPACCO plant) under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), and as a "person" who arranged for the transportation and disposal of hazardous substances under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). 579 F. Supp. at 847. The district court found Lee liable as a "person" who arranged for the disposal of hazardous substances under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), *id.* at 847-48, and as an "owner or operator" of the NEPACCO plant under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), by "piercing the corporate veil." *Id.* at 848-49. The district court also found Michaels liable as an "owner or operator" of the NEPACCO plant under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). *Id.* at 849.

Appellants concede NEPACCO is liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), for arranging for the transportation and disposal of hazardous substances at the Denney farm site. Brief for Appellants at 25-26. Because NEPACCO's assets have already been liquidated and distributed to its

shareholders, however, it is unlikely that the government will be able to recover anything from NEPACCO.

Appellants argue (1) they cannot be held liable as "owners or operators" of a "facility" because "facility" refers to the place where hazardous substances are located and they did not own or operate the Denney farm site, (2) Lee cannot be held individually liable for arranging for the transportation and disposal of hazardous substances because he did not "own or possess" the hazardous substances and because he made those arrangements as a corporate officer or employee acting on behalf of NEPACCO, and (3) the district court erred in finding Lee and Michaels individually liable by "piercing the corporate veil." Appellants have not claimed that any of CERCLA's limited affirmative defenses apply to them. *See* CERCLA's limited affirmative defenses apply to them. *See* CERCLA § 107(b)(1), (2), (3), 42 U.S.C. § 9607(b))1), (2), (3) (no liability if defendatn establishes by preponderance of evidence that release was caused solely by act of God, act of war, act or omission of third party other than employee or agent or by contract only if defendant establishes due care and precautions against foreseeable consequences taken); *see, e.g., United States v. Ward,* 618 F. Supp. at 897-98; *United States v. Conservation Chemical Co.,* 619 F. Supp. at 203-04; *see generally Developments,* 99 Harv. L. Rev. at 1543-48.

The government argues Lee can be held individually liable without "piercing the corporate veil," under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and that Lee and Michaels can be held individually liable as "contributors" under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986). For the reasons discussed below, we agree with the government's liability arguments.[6]

---

[6] Despite the findings by the district court, the government did not seek to impose liability upon NEPACCO, Lee and Michaels under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), as the owners or

A. Liability under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1)

First, appellants argue the district court erred in finding them liable under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), as the "owners and operators" of a "facility" where hazardous substances are located. Appellants argue that, regardless of their relationship to the NEPACCO plant, they neither owned nor operated the Denney farm site, and that it is the Denney farm site, not the NEPACCO plant, that is a "facility" for purposes of "owner and operator" liability under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). We agree.

CERCLA defines the term "facility" in part as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CERCLA § 101(9)(B), 42 U.S.C. § 9601(9)(B); *see New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n.15 (2d Cir. 1985). The term "facility" should be construed very broadly to include "virtually any place at which hazardous wastes have been dumped, or otherwise disposed of." *United States v. Ward*, 618 F. Supp. at 895 (definition of "facility" includes roadsides where hazardous waste was dumped); *see also United States v. Conservation Chemical Co.*, 619 F. Supp. at 185 (stereotypical waste disposal facility); *New York v. General Electric Co.*, 592 F. Supp. 291, 296 (N.D.N.Y. 1984) (dragstrip); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984)

---

operators of a facility where hazardous substances are located, and in these appeals the government has expressed no opinion with respect to "owner and operator" liability under the circumstances in the present case. Brief for Appellee at 46 n.23. The government further argues that it is unnecessary to decide whether Michaels would also be liable under CERCLA § 107)a)(3), 42 U.S.C. § 9607(a)(3), because RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), "so clearly fits the circumstances of this case." Brief for Appellee at 47 n.24. The district court did not reach the question of Michaels' liability under CERCLA § 107(a), 42 U.S.C. § 9607(a). 579 F. Supp. at 849 n.31.

(real estate subdivision). In the present case, however, the place where the hazardous substances were disposed of and where the government has concentrated its cleanup efforts is the Denney farm site, not the NEPACCO plant. The Denney farm site is the "facility." Because NEPACCO, Lee and Michaels did not own or operate the Denney farm site, they cannot be held liable as the "owners or operators" of a "facility" where hazardous substances are located under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

B. Individual Liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3)

CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), imposes strict liability upon "any person" who arranged for the disposal or transporation for disposal of hazardous substances. As defined by statute, the term "person" includes both individuals and corporations and does not exclude corporate officers or employees. *See* CERCLA § 101(21), 42 U.S.C. § 9601(21); *United States v. Ward,* 618 F. Supp. at 894 (CERCLA); *cf. United States v. Pollution Abatement Services of Oswego, Inc.,* 763 F.2d 133, 134-35 (2d Cir.) (individual liability for violation of Rivers and Harbors Appropriation Act of 1899), *cert. denied,* 106 S. Ct. 605 (1985). Congress could have limited the statutory definition of "person" but chose not to do so. *Compare* CERCLA § 101(20A), 42 U.S.C. § 9601(20A) (limiting definition of "owner or operator"). Moreover, construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsbile for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.

First, Lee argues he cannot be held individually liable for having arranged for the transportation and disposal of hazardous substances under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), becuase he did not personally own or possess the hazardous

substances. Lee argues NEPACCO owned or possessed the hazardous substances.

The government argues Lee "possessed" the hazardous substances within the meaning of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because, as NEPACCO's plant supervisor, Lee had actual "control" over the NEPACCO plant's hazardous substances. We agree. It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme. The district court found that Lee, as plant supervisor, actually knew about, had immedicate supervision over, and was directly responsible for arranging for the transporation and disposal of the NEPACCO plant's hazardous substances at the Denney farm site. We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA. *Cf. United States v. Mottolo,* 14 Envtl. L. Rep. (Envtl. L. Inst.) 20497, 20499 (D.N.H. 1984) (person who arranges for disposal or transportation for disposal need not own or possess the hazardous waste).

Next, Lee argues that because he arranged for the transportation and disposal of the hazardous stubstances as a corporate officer or employee acting on behalf of NEPACCO, he cannot be held individually liable for NEPACCO's violations. Lee also argues the district court erred in disregarding the corporate entity by "piercing the corporate veil" because there was no evidence that NEPACCO was inadequately capitalized, the corporate formalities were not observed, individual and corporate interests were not separate, personal and corporate funds were commingled or corporate property was diverted, or the corporate form was used unjustly or fraudulently.

The government argues Lee can be held individually liable, without "piercing the corporate veil," because Lee personally arranged for the disposal of hazardous substances in violation

of CERCLA §107)a)(3), 42 U.S.C. § 9607(a)(3). We agree. As discussed below, Lee can be held individually liable because he personally participated in conduct that violated CERCLA; this personal liability is distinct from the derivative liability that results from "piercing the corporate veil." "The effect of piercing a corporate veil is to hold the owner [of the corporation] liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity." *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978). Here, Lee is liable because he personally participated in the wrongful conduct and not because he is one of the owners of what may have been a less than bona fide corporation. For this reason, we need not decide whether the district court erred in piercing the corporate veil under these circumstances.

We now turn to Lee's basic argument. Lee argues that he cannot be held individually liable for NEPACCO's wrongful conduct because he acted solely as a corporate officer or employee on behalf of NEPACCO. The liability imposed upon Lee, however, was not derivative but personal. Liability was not premised solely upon Lee's status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations.

> A corporate officer is individually liable for the torts he [or she] personally commits [on behalf of the corporation] and cannot shield himself [or herself] behind a corporation when he [or she] is an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his [or her] responsibility.

Donsco, Inc. v. Casper Corp., 587 F.2d at 606 (citations omitted); *see New York v. Shore Realty Corp.*, 759 F.2d at 1052-53

(CERCLA; New York law); *United States v. Conservation Chemical Co.*, 619 F. Supp. at 187-90 (CERCLA); *United States v. Carolawn Co.*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10699, 20700 (D.S.C. 1984) (CERCLA); *United States v. Mottolo*, 14 Envtl. L. Rep. (Envtl. L. Inst.) at 20499; *cf. United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d at 135 (corporate officers liable for violating Rivers and Harbors Appropriations Act of 1899); *see also Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) (general discussion of liability of corporate officers for participation in corporate torts), *citing Lobato v. Pay Less Drug Stores, Inc.*, 261 f.2d 406, 408-09 (10th Cir. 1958); *see generally* 3A W. Fletcher, Cyclopedia of the Law of Private Corporations § 1135 (rev. perm. ed. 1986). Thus, Lee's personal involvement in NEPACCO's CERCLA violations made him individually liable.

C. Individual Liability under RCRA § 7003(a), 42 U.S.C.a. § 6973(a) (West Supp. 1986)

The district court did not reach the question of individual liability under RCRA because it concluded that RCRA did not impose liability upon past non-negligent off-site generators like NEPACCO. As we discussed in Part IV, RCRA is applicable to past non-negligent off-site generators. The government argues Lee and Michaels are individually liable as "contributors" under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986). We agree.

RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), imposes strict liability upon "any person" who is contributing or who has contributed to the disposal of hazardous substances that may present an imminent and substantial endangerment to health or the environment. As defined by statute, the term "person" includes both individuals and corporations and does not exclude corporate officers and employees. *See* RCRA § 1004(15), 42 U.S.C. § 6903(15); *cf. United States v. Johnson &*

Towers, Inc., 741 F.2d 662, 665-66 (3d Cir. 1984) (employees could be criminally prosecuted for RCRA violations), *cert. denied*, 469 U.S. 1208 (1985); *United States v. Ward*, 676 F.2d 94, 97 (4th Cir.) (chairperson of board convicted of unlawful disposal of toxic substances in violation of 15 U.S.C. §§ 2605, 2614, and 40 C.F.R. § 761.01(b)), *cert. denied*, 459 U.S. 835 (1982). As with the CERCLA definition of "person," Congress could have limited the RCRA definition of "person" but did not do so. *Compare* CERCLA § 101(20A), 42 U.S.C. § 9601(20A) (limiting definition of "owner and operator"). More importantly, imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances. *See United States v. Price*, 523 F. Supp. at 1073; *see also* H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 119, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 5690; S. Rep. No. 172, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 8665, 8669.

Our analysis of the scope of individual liability under the RCRA is similar to our analysis of the scope of individual liability under CERCLA. NEPACCO violated RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), by "contributing to" the disposal of hazardous substances at the Denney farm site that presented an imminent and substantial endangerment to health and the environment. Thus, Lee and Michaels can be held individually liable if they were personally involved in or directly responsible for corporate acts in violation of RCRA. *Cf. United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d at 134 (corporate officers and shareholders individually liable for company discharging refuse into creek in violation of Rivers and Harbors Appropriations Act of 1899); *United States v. Johnson & Towers, Inc.*, 741 F.2d at 664-66 (employees criminally liable for RCRA violations).

We hold Lee and Michaels are individually liable as "contributors" under RCRA § 7003(a), 42 U.S.C.a. § 9673(a) (West Supp. 1986). Lee actually participated in the conduct that violated RCRA; he personally arranged for the transporation and disposal of hazardous substances that presented an imminent and substantial endangerment to health and the environment. Unlike Lee, Michaels was not personally involved in the actual decision to transport and dispose of the hazardous substances. As NEPACCO's corporate president and as a major NEPACCO shareholder, however, Michaels was the individual in charge of and directly responsible for all of NEPACCO's operations, including those at the Verona plant, and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances. *Cf. New York v. Shore Realty Corp.*, 759 f.2d at 1052-53 (shareholder-manager held liable under CERCLA).

In summary, we hold Lee individually liable for arranging for the transportation and disposal of hazardous substances in violation of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and Lee and Michaels individually liable for contributing to an imminent and substantial endangerment to health and the environment in violation of RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986).

VI. CAPACITY OF NEPACCO TO BE SUED

The capacity of a corporation to sue or be sued is determined by the law under which it is organized. Fed. R. Civ. P. 17(b). The district court held, under Delaware law, "a corporation with a forfeited charter is not completely dead for all purposes, but merely in 'a state of coma,' during which it is still subject to suit, even if the suit is brought more than three years after the charter forfeiture." 579 F. Supp. at 827 n.1, *citing Ross v. Venezuelan-American Independent Oil Producers Ass'n*, 230 F. Supp. 701 (D. Del. 1964), *and Wax v. Riverview Cemetery Co.*, 41 Del. (2 Terry) 424, 24 A.2d 431 (Super. Ct. 1942).

Appellants argue the district court erred in holding that under Delaware law NEPACCO had the capacity to be sued. Appellants argue NEPACCO did not have the capacity to be sued because the government's action was not brought against NEPACCO until 1980, more than three years after NEPACCO had ceased to do business (1972), had liquidated its assets (1974), and had forfeited its charter for failure to nominate a successor registered agent (1976). *See* Del. Code Ann. tit. 8, § 278. Appellants admit that NEPACCO has failed to file a certificate of voluntary dissolution with the Delaware Secretary of State, but they argue that NEPACCO simply no longer exists as a corporate entity. Appellants argue that under Delaware law the three-year period begins to run after either dissolution or forfeiture, citing *Frederic G. Krapf & Son, Inc. v. Gorson,* 243 A.2d 713, 715 (Del. Super. Ct. 1968).

The government argues the district court correctly held that under Delaware law NEPACCO had the capacity to be sued. The government argues that forfeiture of the corporate charter and voluntary dissolution are not equivalent and that under Delaware law a corporation whose charter has been forfeited has not in fact been dissolved, but instead is merely in a suspended state from which it can be revived at any time.

Although the language in *Frederic G. Krapf & Son, Inc. v. Gorson, id.* at 714, suggest that forfeiture and dissolution may be comparable for purposes of Del. Code Ann. tit. 8, § 278, we agree with the district court that forfeiture of the corporate charter and voluntary dissolution of the corporation are not legally equivalent. The cases distinguishing forfeiture from dissolution are preoccupied with preserving the marketability of titles; however, the case law does support the district court's analysis distinguishing forfeiture from voluntary dissolution. In the key case, *Wax v. Riverview Cemetery Co.,* a holding company had mortgaged certain property it owned. The holding company then conveyed the property and mortgage to a third party. The holding company's charter was then revoked for

nonpayment of taxes. Nine years later the mortgage foreclosed on the property and bought it at a judicial sale. When the mortgagee later sold the property, the prospective buyer challenged the marketability of the mortgagee's title. The state court held that forfeiture of the holding company's charter for nonpayment of taxes "does no more than forfeit the corporate right to do business, but does not extinguish the corporation as a legal entity," and, therefore, the holding company could still "serve as [a] repository of title and as [an] obligor of a debt." 24 A.2d at 436. *Accord Ross v. Venezuelan-American Independent Oil Producers Ass'n,* 230 F. Supp. at 703-04 (federal district court for the District of Delaware interpreting Delaware law); *see generally* 16A W. Fletcher, Cyclopedia of the Law of Private Corporations ch. 65 (rev. perm. ed. 1979). *But cf. Johnson v. Helicopter & Airplane Services Corp.,* 404 F. Supp. 726, 730-35 (D. Md. 1975) (overview of Delaware and federal cases; holding that a corporation that had been dissolved, even though it was still conducting certain proceedings brought during its winding-up period, had lost its capacity to sue and be sued and thus could not be sued more than three years after dissolution).

Here, NEPACCO has lost its charter, but it has not been dissolved. We agree with the district court that, under these circumstances, NEPACCO's charter can be "revived" and that it has the capacity to be sued even though the government's initial complaint was not filed until more than three years after forfeiture.

VII. BURDEN OF PROOF OF RESPONSE COSTS

The district court found appellants had the burden of proving the government's response costs were inconsistent with the NCP, 579 F. Supp. at 580, and that response costs that are not inconsistent with the NCP are conclusively presumed to be reasonable and therefore recoverable, *id.* at 851. Appellants argue the district court erred in requiring them to prove the response costs were inconsistent with the NCP, not cost-

effective or unnecessary. Appellants further argue the district court erred in assuming all costs that are consistent with the NCP are conclusively presumed to be reasonable. Appellants note that the information and facts necessary to establish consistency with the NCP are matters within the possession of the government.

We believe the district court's analysis is correct. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), states that the government may recover from responsible parties "all costs of removal or remedial action . . . not inconsistent with the [NCP]." The statutory language itself establishes an exception for costs that are inconsistent with the NCP, but appellants, as the parties claiming the benefit of the exception, have the burden of proving that certain costs are inconsistent with the NCP and, therefore, not recoverable. *See United States v. First City National Bank,* 386 U.S. 361, 366 (1967). Contrary to appellants' argument, "not inconsistent" is not, at least for purposes of statutory construction and not syntax, the same as "consistent." *See, e.g., United States v. Ward,* 618 F. Supp. at 899; *United States v. Conservation Chemical Co.,* 619 F. Supp. at 186; *Lone Pine Steering Comm. v. EPA,* 600 F. Supp. 1487, 1499 (D.N.J.), *aff'd,* 777 F.2d 882 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 1970 (1986); *New York v. General Electric Co.,* 592 F. Supp. at 303-04 (state action for recovery of response costs); *J.V. Peters & Co. v. Ruckelshaus,* 584 f. Supp. 1005, 1010 (N.D. Ohio 1984), *aff'd,* 767 F.2d 263 (6th Cir. 1985).

The statutory scheme also supports allocation of the burden of proof of inconsistency with the NCP upon the defendants when the *government* seeks recovery of its response costs. As noted above, CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), provides that the federal government or a state can recover "all costs of removal or remedial action . . . not inconsistent with the [NCP]." In comparison, CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), provides that "any other person," referring to any "person" other than the federal

governement or a state, can recover "any other necessary costs of response . . . consistent with the [NCP]." That statutory language indicates that *non*governmental entities must prove that their response costs are consistent with the NCP in order to recover them. The statutory scheme thus differentiates between governmental and nongovernmental entities in allocating the burden of proof of whether resonse costs are consistent with the NCP. *See, e.g., United States v. Ward,* 618 F. Supp. at 899; *New York v. General Electric Co.,* 592 F. Supp. at 303-04 (state action for recovery of response costs).

The statutory language also supports the district court's reasoning that under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), "all costs" incurred by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable. CERCLA does not refer to "all *reasonable* costs" but simply to "all costs." *Cf.* Federal Water Pollution Control Act § 311(f) (FWPCA), 33 U.S.C. § 1321(f) (responsible parties are liable for "actual costs incurred" by the government for cleanup); *see, e.g., Union Petroleum Corp. v. United States,* 228 Ct. Cl. 54, 651 F.2d 734, 744 (1981) (construing "actual costs incurred" in 33 U.S.C. § 1321(f) to apply conclusive presumption of reasonableness). Case law interpreting the FWPCA is relevant because CERCLA defines the NCP by referring to the NCP mandated by the FWPCA. CERCLA §§ 101(31), 105, 42 U.S.C. §§ 9601(31), 9605; *see United States v. Conservation Chemical Co.,* 619 F. Supp. at 204 (noting cross-references in CERCLA to FWPCA); *United States v. Shell Oil Co.,* 605 F. Supp. at 1073-74 & n.4 (the NCP as revised to incorporate CERCLA was issued in 1982).[7]

---

[7] The 1982 NCP, 40 C.F.R. § 300.1-.86 (1985), was revised effective Feb. 18, 1986, 50 Fed. REg. 47,912-79 (1985).

Appellants also argue the district court erred in requiring them to establish that the government's cleanup actions were cost-effective and necessary. This argument challenges the government's choice of a particular cleanup method. We note, however, that CERCLA § 105(3), (7), 42 U.S.C. § 9605(3), (7), requires the EPA, as the agency designated by the President, to revise the NCP required by § 311 of the FWPCA, 33 U.S.C. § 1321, to include the "national hazardous substance response plan," which is specifically required by CERCLA to include "methods and criteria for determining the appropriate extent of removal, remedy, and other measures," and "means of assuring that remedial action measures are cost-effective." Consideration of whether particular action is "necessary" is thus factored into the "cost-effective" equation. The term "cost-effective" is defined by regulation as "the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment." 40 C.F.R. § 300.68(j) (1986).

Because determining the appropriate removal and remedial action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA. The applicable standard of review is whether the agency's choice is arbitrary and capricious. As explained in *United States v. Ward*,

> [i]f [appellants] wish the court to review the consistency of [the government's] actions with the NCP, then they are essentially alleging that the EPA did not carry out its statutory duties. The statute provides liability except for costs "not inconsistent" with the NCP. This language requires deference by this court to the judgement of agency professionals. [Appellants], therefore, may not seek to have the court substitute its own judgment for that of the EPA. [Appellants] may only show that the EPA's decision about the method of cleanup was "inconsistent" with the

> NCP in that the EPA was arbitrary and capricious in the discharge of their duties under the NCP.

618 F. Supp. at 900.

Here, appellants failed to show that the government's response costs were inconsistent with the NCP. Appellants also failed to show that the EPA acted arbitrarily and capriciously in choosing the particular method it used to clean up the Denney farm site.

VIII. REDUCTION OF AWARD BY AMOUNT OF PRIOR SETTLEMENT

Appellants next argue the district court erred in refusing to reduce the amount of its judgment by $100,000, the amount paid by Syntex pursuant to the settlement and consent decree in September 1980. Appellants argue that unless the judgment is offset by the amount of the Syntex settlement, the government will improperly receive a double recovery of that amount from Syntex and appellants. Thus, appellants argue the district court should have reduced the awrd by $100,000.

The government argues the district court correctly refused to reduce the award by the amount of the Syntex settlement. We agree. According to the government's exhibits, the government did not seek a double recovery. The government had incurred response costs of $494,639.54 through March 10, 1983, but sought recovery from appellants of only $394.639.54, or the total amount of its response costs to date reduced by the $100,000 Syntex settlement, plus future response costs. Thus, the government sought to recover from appellants an amount that had already been reduced to reflect the amount of the Syntex settlement.

IX. DEMAND FOR JURY TRIAL

Appellants next argue the district court erred in denying their demand for a jury trial because the government's action for

recovery of its response costs under CERCLA and RCRA was essentially a claim for legal damages. We disagree. When the government seeks recovery of its response costs under CERCLA or its abatement costs under RCRA, it is in effect seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances. *See, e.g., United States v. Price,* 688 F.2d at 213-14 (reimbursement of abatement costs under RCRA as equitable relief); *United States v. Mottolo,* 605 F. Supp. at 912-13 (citing seven cases, including *NEPACCO,* that characterize recovery of response costs under CERCLA as equitable relief); *see generally Developments,* 99 Harv. L. Rev. at 1492 & nn.46, 47. The district court correctly found appellants did not have a right to a jury trial of claims for equitable relief. *See Ross v. Bernhard,* 396 U.S. 531, 533 (1970).

X. CONCLUSION

In conclusion, we hold (1) CERCLA applies retroactively, (2) the government can recover its pre-enactment response costs under CERCLA, (3) RCRA imposes strict liability upon past off-site generators and transporters of hazardous substances, (4) Lee and Michaels can be held individually liable, (5) NEPACCO had the capacity to be sued, (6) appellants had the burden of proving the government's response costs were inconsistent with the NCP, (7) the government's award should not be reduced by the Syntex settlement, and (8) appellants did not have the right to a jury trial.

Accordingly, the judgment of the district court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. The district court's refusal to dismiss NEPACCO as a party defendant, retroactive application of CERCLA to pre-enactment conduct, imposition of individual liability upon corporate officers who actually control the handling and disposal of hazardous substances, placement

upon the responsible parties of the burden of proof that the government's response costs are inconsistent with the NCP, refusal to reduce the award by the amount of the prior settlement, and denial of a jury trial are affirmed. The district court's refusal to allow the government to recover its response costs incurred before the enactment of CERCLA in 1980, refusal to impose strict liability upon past off-site generators and transporters of hazardous substances under RCRA § 7003(a), 42 U.S.C.A. § 6973(a) (West Supp. 1986), and imposition of liability upon appellants as owners or operators of a facility pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), are reversed.

On remand, before awarding a specific amount of pre-enactment response costs to the government under CERCLA, the district court should afford appellants an opportunity to show that the government's pre-enactment response costs were inconsistent with the NCP. Alternatively, because the government also sought to recover the response costs it incurred before the enactment of CERCLA in the form of equitable relief as abatement costs under RCRA, on remand the district court could grant the government recovery of such costs as a matter of equitable discretion.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's opinion except for parts IV-A, IV-B, and V-C, holding that RCRA § 7003(a), 42 U.S.C. § 6973(a) (1982), imposes liability on past off-site nonnegligent generators and transporters and determining that the government could recover its response costs from Lee and Michaels under section 7003(a). I respectfully dissent from the court's opinion as to those points.

The majority's analysis of liability under the RCRA focuses exclusively on the legislative history of the 1984 amendments to the RCRA. The majority particularly rely on House Con-

ference Report No. 1133, which singles out the district court's opinion and states that it is "inconsistent with the authority conferred by [section 7003] as initially enacted and with these clarifying amendments." H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 119 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 5649, 5690. The Conference Report also states that section 7003 "has always" reached nonnegligent generators and transporters. *Id.* From these statements, the majority conclude that "the 98th Congress made clear that the intention of the 94th Congress in enacting the RCRA in 1976 had been to impose liability upon past nonnegligent off-site generators and transporters of hazardous waste." *Ante* at 27. Thus, the majority hold that the RCRA as it read *prior* to the 1984 amendments imposed strict liability upon past generators and transporters and that the district court erred in holding that proof of fault or negligence was necessary for the government to recover its response costs under the RCRA. *Ante* at 26-27.

I think that the 1984 House Conference Report is nothing more than a blatant effort by members of a later Congress to graft their personal views of the scope of liability under the RCRA onto the original act. It is bootstrapping, and the majority fail to recognize it as such. The Conference Report characterizes the 1984 amendments as "clarifying" the RCRA. The "clarifying" amendments to section 7003, however, did not alter the crucial phrase "contributing to," the construction of which the majority acknowledge as "the critical issue," *ante* at 21, other than to cast it in both the present and the past tense: "has contributed to or * * * is contributing." 42 U.S.C.A. § 6973(a) (West Supp. 1986). Nor do the amendments supply a definition for this phrase. The amendments to section 7003(a) are directed toward changing the scope of the section to reach past as well as present and future generators and transporters of hazardous waste. I believe this to be a substantive change, rather than a clarification. In any event, because the amendments did not relate to the "contributing to" language, the statements in the House Conference report regarding the stan-

dard of liability under section 7003(a)—negligence versus strict liability—are wholly gratuitous.

"[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). "[S]uch '[l]egislative observations . . . **are in no sense part of the legislative history.**' **'It is the** intent of the Congress that enacted [the section] . . . that controls.' " *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 758 (1979) (quoting *United Airlines, Inc. v. McMann,* 434 U.s. 192, 200 n.7 (1977), and *Teamsters v. United States,* 431 U.S. 324, 354 n.39 (1977)). Moreover, the Supreme Court has observed that "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Products Safety Commission v. GTE Sylvania,* 447 U.S. 102, 118 n.13 (1980). This court has also recently acknowledged the dubious value of subsequent legislative history. *See Citizens State Bank of Marshfield v. FDIC,* 751 F.2d 209, 217 (1984). Applying these principles to the district court's interpretation of the RCRA and its legislative history, I would affirm its resonable conclusion that Congress did not intend to impose strict liability on past generators and transporters of hazardous waste. I would not accept at face value the assertion by certain members of the 98th Congress that they can divine the intent of the 94th Congress in enacting the RCRA some eight years earlier.

I recognize that the substance of the 1984 amendments may have a bearing on this case. The district court did not have before it the amendments or their associated legislative materials. As a general rule we are to apply the law in effect at the time we render our decision. *See, e.g., Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974). The majority purport to base their decision on the RCRA as it existed prior to the 1984 amendments, however, and agree with the House Conference Report that the 1984 amendments, merely "clarified" the scope

of liability under the RCRA. *Ante* at 28. I differ. I have already observed that I believe the 1984 amendments significantly altered the scope of liability under the RCRA. I think that the parties should at least be given the opportunity to develop their factual and legal contentions as to the effect of and in light of the 1984 amendments before the district court and thus present the issue more squarely for our consideration, if appealed.

I also disagree with the majority's determination that Lee and Michaels are liable under section 7003(a) for the government's response costs as generators and transporters. The district court did not reach this issue, as it concluded that RCRA liability did not extend to past nonnegligent generators and transporters of hazardous waste. The majority, however, both reverse the district court's legal conclusion and then find as a factual matter that Lee and Michaels are liable. *Ante* at 36-37. This type of factfinding is clearly the province of the district court, and remanding the question of liability to the district court is more appropriate than the course of action taken by the court today. *Missouri Pacific Joint Protective Board v. Missouri Pacific Railroad Co.*, 730 F.2d 533, 537 (8th Cir. 1984).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1837/1853WM

United States of America,
Appellee/Cross-Appellant,

v.

Northeastern Pharmaceutical & Chemical Co.,
Inc., etc., et al.,
Appellants/Cross-Appellees.

Ronald Mills and Syntex Agri-business, Inc.

Appeal and Cross-appeal from the United States
District Court for the Western District of Missouri.

JUDGMENT

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion of this Court.

December 31, 1986

Appellee/Cross-Appellant will recover from appellants/cross-appellees the sum of $117.30.

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1837/1853WM

United States of America,
Appellant/Cross-Appellant,

v.

Northeastern Pharmaceutical & Chemical Co., Inc.,
etc., et al.,
Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Western District of Missouri.

Appellants/Cross-Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges John R. Gibson and Theodore McMillian would have granted the petitions. Judge Arnold declined to participate in the voting.

Petition for rehearing by the panel is also denied.

April 8, 1987

Order entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 80-5066-CV-S-4

United States of America,
Plaintiff,

vs.

Northeastern Pharmaceutical and Chemical
Company, Inc., et al.,
Defendants.

MEMORANDUM OPINION

The plaintiff instituted this action on August 1, 1980 and filed an amended complaint on August 19, 1982 seeking injunctive relief and reimbursement of all costs incurred in performing certain remedial and removal actions at the Denney farm site, near Verona, Missouri, pursuant to section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, and sections 104, 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9604, 9606(a) and 9607(a). The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345; 42 U.S.C. § 6973, and 42 U.S.C. §§ 9604, 9606(a), and 9613(b).

Summary of Issues

The Court considered the following issues:

1. Whether section 7003 of RCRA or sections 104, 106(a) and 107(a) of CERCLA apply retroactively to hold past non-negligent off-site generators and transporters liable for the costs incurred in the cleanup of an inactive or abandoned hazardous waste disposal site?

2. Whether sections 104, 106(a) and 107(a) of CERCLA apply retroactively to hold past non-negligent off-site generators and transporters liable for response costs incurred prior to the enactment of CERCLA?

3. If CERCLA is to be applied retroactively, does it violate the Fifth Amendment Due Process Clause of the United States Constitution?

4. What standard of liability should be imposed under CERCLA — strict liability or negligence?

5. If the defendants are liable, whether joint and several liability should be imposed?

6. Whether the Denney farm disposal site presented an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from the site?

7. Whether these specific defendants are liable under the provisions of CERCLA?

8. If the defendants are liable under CERCLA, what costs are recoverable by plaintiff?

Summary of Conclusions of Law

The Court finds that:

1. Section 7003 of RCRA does not apply retroactively to past non-negligent off-site generators and transporters.

2. Sections 104, 106(a) and 107(a) of CERCLA do apply retroactively to past non-negligent off-site generators and transporters.

3. Sections 104, 106(a) and 107(a) of CERCLA do not apply retroactively to response costs incurred prior to December 11, 1980.

4. CERCLA does not violate the Fifth Amendment Due Process Clause.

5. The standard to be applied in determining liability under CERCLA is strict liability.

6. CERCLA allows for the imposition of joint and several liability.

7. The Denney farm site presented an imminent and substantial endangerment to the public health, welfare and the environment.

8. All four defendants are jointly and severally liable pursuant to CERCLA for all costs for salaries, expenses and attorney fees.

9. All four defendants are jointly and severally liable for prejudgment interest at the rate of 9% per annum calculated from August 19, 1982, as well as, all future costs of removal or remedial actions incurred by the plaintiff not inconsistent with the national contingency plan.

INITIAL FINDINGS OF FACT

Defendant Northeastern Pharmaceutical and Chemical Co., Inc. (NEPACCO) is a corporation incorporated in 1966 under the laws of Delaware with its principal office in Stamford, Connecticut. NEPACCO's corporate charter was forfeited by the Delaware Secretary of State on August 22, 1976, for failure to maintain an agent for service of process. NEPACCO never filed a certificate of voluntary dissolution with the Delaware Secretary of State, although in 1974 its assets were liquidated and the proceeds distributed to shareholders after payment of the corporation's outstanding debts.[1] Defendant Edwin B. Michaels (Michaels) formed NEPACCO, held stock in the corporation, and was its president. Defendant John W. Lee (Lee) was the vice-president of NEPACCO and was also a stockholder. Defendant Ronald Mills (Mills) was employed by

NEPACCO at the Verona, Missouri plant as shift supervisor. Defendant Syntex Agribusiness, Inc. (Syntex) is a corporation incorporated in the State of Delaware and doing business in the State of Missouri.

The NEPACCO Manufacturing Process

On June 7, 1967, defendant Michaels applied for a patent on a method of manufacturing hexachlorophene. On February 6, 1968, defendants Michaels and Lee applied for a patent on a method for purifying 2, 4, 5-trichlorophenol (TCP) and hexachlorophene. On or about November 18, 1969, NEPACCO entered into an agreement with Hoffman-Taff, Inc., whereby NEPACCO leased portions of the premises at an existing manufacturing facility located near Verona, Missouri, and purchased manufacturing equipment used by Hoffman-Taff and located therein for the purpose of manufacturing hexachlorophene. Hoffman-Taff had manufactured the compound known as agent orange prior to their closure and subsequent sell-out to Syntex. NEPACCO manufactured hexachlorophene at the Verona facility from April 1970 to January 1972. Michaels was present at the Verona facility on a permanent basis during the first year of operation and construction (1970) and during that time had overall responsibility for company operations with the upper level employees reporting to him. By early 1971, Michaels had moved back to the state of Connecticut leaving the direct management responsibility for the NEPACCO plant operation and for quality control with Lee.

The process by which NEPACCO manufactured hexachlorophene involves two steps: First, the production of 2,4,5-Trichlorophenol (TCP) and second, the production of the finished product, hexachlorophene. The first step in the production of hexachlorophene involved a reaction to form a crude intermediate TCP. This reaction involved a distillation process resulting in refined TCP as the distillate. 2,3,7,8-tetrachloro-

benzo-p-dioxin (dioxin or TCDD), among other chemicals, was formed as a by-product in the TCP process. The residue or waste that resulted from the TCP distillation is called still bottoms, described as a "dark oily sludge." The highest concentrations of dioxin are found in the still bottoms. Still bottoms were removed from the process every 3rd or 4th batch and transferred to a 7,500 gallon holding tank that was located on the west side of the plant. The holding tank was periodically emptied by waste haulers, who carried the still bottom residue away in tank trunks.

The second step of the production process involved the reaction of the refined TCP with sulfuric acid to form hexachlorophene as a precipitate. Toluene and water were then added to this crude extraction. Decolorizing and filtering clays were added to extract the undesirable shades of color and other impurities, one of which was dioxin. The finished product was hexachlorophene that resembled "white flour." Waste streams from the second step included: waste solvents; recrop liquor remaining after the hexachlorophene had been precipitated; clay filter cake and waste water from both steps of the process as well as from general maintenance and cleaning.

Dioxin may have been found in each waste stream. TCP, TCB and Toluene may have been found in the waste solvents, contaminated waste water and clay filter cake. Hexachlorophene may have been found in the recrop liquor and clay filter cake. Depending upon the efficiency of the production system, the refined TCP may have contained dioxin that was passed on into the hexachlorophene process. Accordingly, the more efficient a system, the less dioxin contained in the refined TCP, if any. If the refined TCP did contain dioxin, then the dioxin would have been found in the following materials, listed in high to low concentration priority: clay filter cake, finished hexachlorophene and waste water. The industry standard in 1971 for levels of dioxin in refined TCP was one part per million (ppm). The process and equipment used by

NEPACCO in 1971 met industry standards and it was conceivable that if the NEPACCO process was continuously efficient the level of dioxin found in the refined TCP would have been below 1 p.p.m.

Michaels and Lee knew that the NEPACCO manufacturing process produced by-products that contained toxic substances, including dioxin, that could be harmful to human health. Apparently, Michaels and Lee had meetings with the NEPACCO employees to inform them of the possible dangerous toxic substances and procedures to avoid and remedy exposure to these substances.

Unfortunately, the NEPACCO process was not without mishap. On one occasion the 7,500 gallon waste storage tank was filled to capacity and the overflow (still bottoms) was put in four (4) bung type 55-gallon drums that were sealed and marked with orange or red paint. Bill Ray (plant manager) testified that once the storage tank was emptied by the tank truck haulers, the still bottoms contained in the four bung-type barrels were pumped back into the 7,500 gallon storage tank. On two or three occasions the lines to the 7,500 storage tank became blocked necessitating a clean-out operation. On occasion, during these clean-out operations, a small portion of the line spilled onto the floor of the plant and the employees performing the operation. Ray recited one such incident in which he was sprayed with a fine mist by approximately one and a half to two gallons of the substance. Ray immediately showered and took other precautionary steps. The residue and waste from these cleanup operations were placed in trash cans and subsequently taken to the sanitary land fill. Ray testified that he has suffered no ill effects from this incident.

In March of 1971 there was a fire at the NEPACCO plant that resulted in the destruction of at least two batches of reactants in the hexachlorophene production phase of the process. Due to extensive damage, the plant was closed down for several weeks

in order to clean up the residue, waste and damaged equipment created by the fire. Some of the substances contained in the production lines were saved and reused. During the summer of 1971, Lee and Ray initiated a major plant cleanup. The waste and residue from the major cleanup were stored in the waste storage area northwest of the plant building. This storage area also contained refuse and wastes that had accumulated since the opening of the plant.

NEPACCO used black drums with lids fastened by metal rings for disposal of waste. According to the testimony, Hoffman-Taff had used green and white drums to hold wastes and several of these green and white drums remained on the plant property after Hoffman-Taff ceased operations. Defendant Lee testified that he originally noticed some of these green and white drums stored on the eastern side of the plant building, but by mid-1971, these drums had been moved to the northwest storage area.

Disposal of Hazardous Waste at NEPACCO

Initially, the still bottoms residues from the NEPACCO process were carried away in transport tanker trucks by Rollins-Purle to their disposal plant in Louisiana. Later, due to cost considerations, NEPACCO changed from Rollins-Purle to Independent Petrochemical Corporation (IPC). Michaels was present during negotiations with IPC over the contract to haul still bottom residues from the NEPACCO plant and warned the IPC representatives that the still bottoms were toxic and had to be handled and disposed of with care.

In or about July of 1971, defendant Mills approached Ray concerning the disposal of the 55-gallon drums located in the storage area northwest of the plant. Mills was not in the business of waste disposal prior to this date. Ray discussed the proposal with Lee. Lee defined the desirable disposal site characteristics, which included soil with a flint or clay consistency. There was credible evidence that Lee knew and approved of

the proposed use of Mill's services and the disposal site. Ray personally went to the disposal site prior to the actual delivery and reported to Lee on his observations. Mills had previously contacted James Denney (Denney) and arranged to dispose of the drums on his farm. The Denney farm site is located approximately seven miles south of Verona, Missouri.

In mid-July 1971, defendant Mills and Gerald Lechner (Lechner), an assistant hired by Mills, loaded approximately eighty-five 55-gallon drums containing wastes, located at the northwest storage site. Defendant Mills and Lechner took the drums to the Denney farm and deposited them in a large trench approximately six to eight feet deep, ten feet wide and fifty feet long. Mills hired Leon Vaughn (Vaughn) to excavate and close the trench. Within two days, six loads were taken to the Denney farm site, whereupon, the trench was closed by Vaughn. No other materials were placed in the Denney farm trench other than those transported by Mills and Lechner from the Verona NEPACCO plant. Mills received $150.00 from NEPACCO for each load that was taken to the Denney farm site and Denney received $25.00 from Mills for each load.

Mills and Lechner testified concerning the description of the drums hauled and their contents. According to Mills, most of the drums were a black metal type with lids. Mills did not recall whether there were any bung type drums hauled. Mills further testified that some of the barrels contained a brown liquid substance and some contained a white substance. Mills was certain that some of the barrels contained Toluene. Lechner gave a more detailed description of the barrels and their contents. According to Lechner, some of the drums were a bung type top and others had the open lid type top. Although most of the drums were black, some were rust colored. The drums were in a deteriorated condition. While Lechner was loading the barrels, he managed to step through the lid of one barrel causing some of the "dark sludge", presumably still bottoms, contained in the drum to get on his pants leg and boot. Lechner did not

notice any immediate results but later noted that the substance "ate up" his pants leg and boot. Lechner testified that he has suffered no physical injuries from the mishap.

Neither Mills nor Lechner could remember whether they hauled any drums other than those colored black. James Denney testified that when the trench was opened in 1980 by the EPA he observed some green drums being taken from the trench. Denney further testified that within a short period of time after the trench had been covered, a strong odor emitted from the trench. This strong odor continued for several months, maybe years, but had ceased by 1979.

Governmental Response

In October of 1979 the Environmental Protection Agency (EPA) received an anonymous tip indicating that waste materials from the NEPACCO plant had been disposed at the Denney farm. Under the supervision of Daniel Harris (Harris), an EPA environmental engineer and field investigator, the EPA commenced an investigation. The EPA confirmed through state records that the NEPACCO operation did generate hazardous waste. In October of 1979, EPA representatives met with Denney, who confirmed that drums of wastes from the NEPACCO plant had been buried in a trench at the Denney farm and identified the location of the trench. EPA representatives contacted Dr. J. Hadley Williams (Williams), a geologist with the Missouri Department of Natural Resources, for the purpose of determining if the Denney farm was suitable for the disposal of hazardous wastes. Dr. Williams indicated it was not, due to the nature of the region's subsurface composition and ground water conditions. EPA representatives interviewed approximately 25 other persons in October of 1979 in order to gain some familiarity with the NEPACCO operation, its wastes, and its waste disposal practices.

Between January and April of 1980, the EPA, along with comments from state and federal officials, drafted a plan for an

on-site investigation at the Denney farm site. Prior to conducting on-site sampling tests, certain preliminary steps were completed, which included clearing the disposal site and an access road and constructing a security fence around the site.

In April of 1980, the EPA commenced the on-site investigation which consisted of different teams of individuals collecting soil samples from boreholes at different distances around the perimeter of the site, removing a portion of the soil covering the trench, exposing 13 drums, sampling eight of them, and sampling the soil in and near the trench. Samples were also taken of nearby well water. The drums exposed and those finally removed were in a deteriorated condition, exhibiting extreme rust and decomposition.

A composite sample from the buried drums, collected during the April 1980 investigation, was analyzed by Brehem Laboratories at Wright State University and found to contain a dioxin concentration as high as 319 parts per million (ppm). Dr. Michael L. Taylor, associate director of the laboratory, testified that he immediately telephoned the Region 7 office of the EPA when he learned of the alarming high concentration of dioxin found in the composite sample. Other samples from the buried drums and soil samples collected during the April 1980 investigation were analyzed by the EPA and found to contain TCP and toluene in concentrations as high as 6 ppm and 40 ppm, respectively. Dr. Robert D. Kloepfer (Kloepfer), an analytical chemist and Chief of the Organic Analysis Section for Region 7, EPA, noted seven samples with concentrations above 1.0 ppm, specifically those concentrations were reported as follows: drum sample 1—6.6 ppm, drum sample 3—1.1 ppm, sample No.'s ANO216—1.1 ppm, ANO217—2.1 ppm, ANO237—6.3 ppm, ANO241—5.6 ppm and ANO271—.9 ppm. The standard variation (degree of accuracy) for these tests is 25%, higher or lower. The EPA's principal concern at this time was the presence of dioxin.

After confirming that dioxin was present in the trench and consulting with Dr. Williams, the EPA in June or July of 1980 installed a temporary cap over the trench to prevent entry of surface waters into the trench and thereby minimize release of materials from the trench into the environment. EPA representatives continued to conduct surface and well water samplings to monitor the site in order to detect any escape of the materials from the trench.

Ecology and Environment, Inc. (Ecology and Environment), under contract with the EPA, prepared an engineering feasibility study to serve as the plan for further response actions at the Denney farm site. James Buchanon, regional project manager for Ecology and Environment, testified that Ecology and Environment was assigned three principal tasks: conduct a feasibility study, provide expert technical advice at the site and monitor the site. As part of these tasks, additional on-site testing was completed to better define the extent of the release and the size of the disposal trench. The final report and suggestions for remedial action were issued in September, 1980. The final report and suggestions issued by Ecology and Environment were made under the hypothesis that the Denney farm trench contained 26.4 lbs. of dioxin, the maximum risk potential for this site.

In July and August of 1980, EPA representatives negotiated with Syntex concerning the initial cleanup process and responsibilities. On September 3, 1980, a consent decree was entered into by the EPA and Syntex.[2] In November of 1980, defendant Syntex proposed a plan for a permanent solution involving the removal, storage and ultimate disposal of the wastes discovered at the Denney farm site. Once the Syntex plan was approved by the EPA, Syntex began excavation of the contents of the disposal trench in June of 1981. The excavation process took approximately six weeks, due mainly to the safety precautions taken against dioxin contamination of the workers.

During the Syntex excavation, numerous drum and soil samples were collected by the EPA and Syntex. The Syntex analysis indicated migration of the dioxin into the subsurface strata of the trench at least as far as 30 inches, in concentrations ranging from 8.2 parts per billion (ppb) to 532 ppb. While Syntex is in the process of implementing a permanent solution, the EPA continues to monitor its implementation of the Syntex plan and otherwise to monitor the site and the surrounding area to detect any past or present movement of hazardous waste from the site or any significant change in the conditions.

The site was closed in November of 1981 and the drums are stored in a concrete bunker on the site. According to Harris the stored hazardous waste no longer presnets an imminent and substantial endangerment to health or the environment, but necessitates future monitoring and further response costs.

Endangerment to Health and the Environment

To date, dioxin has produced teratogenic, mutagenic, fetotoxic and carcinogenic results in low dose levels in various laboratory animals. Dr. D. Diane Courtney, a pharmacologist with the EPA, testified that dioxin is particularly devastating to specific organs of laboratory animals and human beings; e.g., liver, kidneys, intestines, nervous system, reproductive, and skin. Dioxin is persistent in the environment and is bio-accumulative in the tissues of plants and animals. According to Dr. Courtney, there is presently no known safe level of dioxin in the environment. Toluene has been shown to cause damage to the liver and kidneys. Hexachlorophene has known toxicological properties and has caused pathological damage, specifically brain deterioration in newborn animals, as well as kidney and liver damage. Dioxin, hexachlorophene and toluene have high levels of toxicity at low-dose levels.

There was a substantial likelihood that the environment and human beings would be exposed to the toxic wastes dumped in

the Denney farm trench. Dr. Williams testified that the Denney farm is located in an area of karst terrain underlain by limestone bedrock with sinks, underground streams and caverns. The geohydrology at the Denney farm is such that particles, water and leachate may move rapidly down through the soil to the water table below. This rapid movement occurs through randomly occurring discreet openings in the soil and rock. The ground water beneath the Denney farm was estimated by Dr. Williams to be the source of water for a number of nearby residential and agricultural wells. While the ground water beneath the site is believed to form a water table that may flow towards Calton Creek, approximately one-third mile from the Denney farm site, actual rates and directions of ground water movement in the Denney farm area are impossible to predict. Unfortunately, it is impossible to predict whether high levels of toxic dioxin or other hazardous contaminants remain in the karst soil beneath the Denney farm, presenting future possibilities of exposure, if the permeability of the soil and bedrock allow the substances to flow toward the Calton Creek. Though not conclusive of the ground water movement beneath the Denney farm site, Dr. Williams did conduct dye tests in the region. Dr. Williams placed a dye in certain boreholes upstream on the Calton Creek in the Denney farm region in April of 1980. One month later, May of 1980, Dr. Williams found traces of this dye in area springs and wells and collecting in charcoal packets placed downstream on the Calton Creek. Because of the region's soil conditions, there was a substantial likelihood of the hazardous wastes in the trench at the Denney farm site entering the environment and going into the ground water system; whereupon, the contaminants may have come into contact with members of the public who may have been adversely affected by their exposure to these wastes.

Pursuant to the consent decree, entered September , 1980, Syntex removed the deteriorated drums and other contaminated materials from the trench and placed them in temporary

storage, concrete bunker, on the Denney farm site. As of yet, Syntex has not successfully developed a feasible method of permanent disposal. The wastes no longer present an imminent and substantial endangerment.

DISCUSSION

I. Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6973 (1980)

Count I of plaintiff's amended complaint is based on section 7003 of RCRA, which states, in pertinent part:

> § 6973. Imminent hazard
>
> (a) Authority of Administrator
>
> Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected state of any such suit. The Administrator may also, after notice to the affecte state, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

In order to recover the costs expended by the government under section 7003, the plaintiff must show that the defendants are such persons contributing to the handling, storage, treatment, transportation or disposal of a hazardous waste which may present an imminent and substantial endangerment to health or the environment.

The Court finds that the defendants are not liable under section 7003 for the response costs incurred prior to December 11, 1980. The pivotal issue relative to the application of section 7003 to the named defendants is whether the defendants were "contributing to such handling, storage, treatment, transportation or disposal" within the intended scope of section 7003. It must first be observed that the plaintiff does not allege negligence on the part of the defendants. The Court has reviewed the initial complaint, the amended complaint, the standard pretrial order No. 2, and trial notes and has found no allegation of negligence by the defendants. The issue is therefore more properly narrowed to state, whether a past non-negligent off-site generator and transporter can be held liable under section 7003 for response costs. Plaintiff contends that the defendants are "contributing to" the present "disposal" of the hazardous waste insofar as the hazardous wastes are presently "leaking" from the Denney farm site into the environment. In support of this proposition, plaintiff further contends that section 7003 does not require present active human involvement but merely a present imminent and substantial endangerment for which the defendant is strictly liable, regardless of the time at which the active human involvement ceased.[3] Defendants in opposition contend that section 7003 does not apply to inactive or abandoned sites such as the Denney farm site, *United States v. Waste Industries,* 556 F.Supp. 1301, 1303-14 (E.D. N.C. 1982), and even if section 7003 does apply to inactive sites, section 7003 does not make past non-negligent off-site generators or transporters liable. *United States v. Wade,* 546 F.Supp. 785 (E.D. Pa. 1982). After a thorough review and analysis of the statutory language, case law and legislative history, the Court finds that section 7003 does not apply to past non-negligent off-site generators or transporters. Because the Court makes this narrow finding, it will not be necessary to address the issue of whether section 7003 applies to inactive or abandoned sites under different factual circumstances.

If the statutory language is clear and unambiguous, then the language is controlling. *Touche Ross v. Redington,* 442 U.S. 560, 568 (1979) and *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976). If the defendants are to be held liable under section 7003 then they must be classified as part of the class of persons "contributing to such handling, storage, treatment, transportation or disposal" resulting in the imminent and substantial endangerment. 42 U.S.C. § 6973. Initially, the Court notes that the phrase "contributing to" is not defined in the statutory framework of RCRA, specifically 42 U.S.C. § 9603, nor does the statutory framework of RCRA lend substantial support to the inclusion of past non-negligent off-site generators or transporters.

Not having found the statutory framework of RCRA particularly illuminating on the phrase "contributing to," this Court concurs in the language found in *City of Philadelphia v. Stepan Chemical Co.,* 544 F.Sup. 1135 (E.D. Pa. 1982), quoting: "Chief Justice Marshall's timeless observation that '[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived....' *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805)." *Id.* at 1142. As numerous courts have noted, the legislative history of RCRA and specifically 7003 is "quite sketchy," *United States v. Midwest Solvent Recovery, Inc.,* 484 F.Supp. 138, 143 (N.D. Ind. 1980), confusing and in some instances seemingly contradicting. *Waste Industries,* 556 F.Supp. at 1311; and *Wade,* 546 F.Supp. at 791. Apparently, Congress' major purpose in passing RCRA was to control the manner of disposing of hazardous wastes as opposed to cleaning up the results of past disposal. RCRA ha been amply termed "cradle-to-grave" regulatory legislation, designed to trace the life cycle of hazardous waste.[4] Congress specifically stated the goal of RCRA as follows:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in en-

> vironmental law, that of unregulated land disposal of discarded materials and hazardous wastes.... This legislation is necessary if other environmental laws are to be both cost and environmentally effective.

H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6238, 6241-42. The Committee Report continues to explain how the government has spent substantial amounts of money on air and water pollution control merely to have the waste dumped into or on the ground. *Id.*

Although it could be argued that Congress was unaware of the problems arising from inactive or abandoned sites, Congress expressly recited such instances of the damage caused by hazardous waste disposal practices in the legislative history. H.R. Rep. No. 1491, *supra,* at 17-24, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6254-6261. It would be more properly stated that Congress was unaware of the magnitude and expense of inactive or abandoned sites, as well as the lack of current means or financially responsible parties to clean up those sites.[5] This Court concludes that Congress, knowledgeable of the existence of hazardous waste problems, chose to principally direct RCRA's provisions toward the regulation of the source and not the results of hazardous waste disposal.[6]

In reviewing the subsequent legislative history of RCRA and CERCLA, it appears that Congress and the American public became more aware of the magnitude and expense of the problems associated with inactive sites as the Love Canal and similar sites came to the forefront.[7] Congress appeared more enlightened of the massive problems arising from inactive sites when discussing the need for further legislation, "Since enactment of [RCRA], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' ... Existing law is clearly inadequate to deal with this massive problem." H.R.

Rep. No. 1016, 96th Cong., 2d Sess. 17-18, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119, 6120.[8]

The only reference in the legislative history that would lend support to the position that section 7003 applies to past non-negligent off-site generators or transporters states, "a company that generates hazardous waste would be someone 'contributing to' an endangerment under § 7003, even where someone else deposited the waste in an improper disposal site similar to strict liability under common law." *Report on Hazardous Waste Disposal by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. 31 (Comm. Print 1979) [hereinafter cited as Eckhardt Report]. This subcommittee report is subject to numerous objections.[9] Most importantly, the broad language of the Eckhardt Report was not adopted in the full Senate report which reinstated a standard of negligence under section 7003, in stating:

> [S]ection 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as person 'contributing to' disposal resulting in a substantial endangerment, are meant to be more liberal than their common law conterparts. For example, a company that generated hazardous waste might be someone 'contributing to' air endangerment under section 7003 even where someone else deposited the waste in an improper disposal site (similar to strict liability under common law), *where the generator had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.*

S. Rep. No. 172, 96th Cong., 2d Sess. 5, reprinted in [1980] U.S. Code Cong. & Ad. News 5019, 5023 (emphasis added). At best, this language would suggest strict liability of present responsible landowners, but the qualifying phrase "illicit disposal or failed to exercise due care" requires a finding of negligence prior to holding past off-site generators or

transporters liable. Although this Court is in agreement that the phrase "contributing to" is to be given a broad interpretation, *United States v. Price,* 523 F.Supp. 1055, 1073 (D. N.J. 1981), the Court believes the language found in *Midwest Solvent Recovery, Inc.,* 484 F.Supp. at 144, to be a more prudent conclusion, "Any provision that could logically be read so to expand the set of persons liable under the federal solid and hazardous waste regulatory scheme would surely be identified as such in the legislative history." *Id. Accord Waste Industries,* 556 F.Supp. at 1308; and *Wade,* 546 F.Supp. at 790.[10]

After a careful review of what this Court believes to be all cases relevant to the imposition of liability under section 7003,[11] it has been unable to find any case in which liability has been imposed on past non-negligent off-site generators or transporters. The broadest scope of liability given the phrase "contributing to" was in *United States v. Price,* 523 F.Supp. 1055 (D. N.J. 1981), *aff'd,* 688 F.2d 204 (3rd Cir. 1982) (denying petition for preliminary injunction and motion for summary judgment) and *United States v. Price,* No. 80-4104 (D. N.J. July 28, 1983) (denying past off-site generators' motion for summary judgment). In *Price,* 523 F.Supp. at 1069-1074, the Court held that liability under section 7003 could encompass the present owners of the inactive site, the past principle owner/operator and co-owner of the site, as well as, an employee of the past owner/operator. This Court does not deem it necessary to comment at this time upon the rationale of the district court in *Price,* 523 F.Supp., except to point out that in its subsequent memorandum opinion, *Price,* No. 80-4104, the court specifically reserved any decision on the liability of past non-negligent off-site generators under section 7003. *Id.,* slip op. at 26 n.12.[12]

The Court having reviewed the statutory language, the legislative history and the past judicial interpretations of sections 7003 concludes that the defendants are not liable under section 7003. This finding is based upon the Court's conclusion that section 7003 does not impose liability upon past non-negligent off-site generators or transporters.[13]

II. Sections 104, 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9604, 9606(a) and 9607(a)

Counts II and III of the amended complaint were brought pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a) and sections 104, 107(a) of CERCLA, 42 U.S.C. §§ 9604 and 9607(a), respectively. Specifically, the prayer for relief includes a request to abate an imminent and substantial endangerment to health and the environment caused by the continuing storage and disposal of hazardous waste at the Delaney farm site and for reimbursement of response costs incurred by the plaintiff.

Before dealing with the issues, a brief history and general outline of CERCLA appears advisable for benefit of further discussion. CERCLA was enacted in response to the inadequacies of RCRA and "to the growing problem caused by the large number of uncontrolled 'inactive hazardous waste sites.' In fact, Congress, describing the background and necessity for CERCLA, specifically noted that 'existing law is clearly inadequate to deal with this massive problem...[and therefore] the need for a strong legislative response is evident.' [citation omitted]." *Price,* No. 80-4104, slip op. at 11. *See also Wade,* 546 F.Supp. at 792-93. Most importantly, CERCLA establishes two funding mechanisms for the cleanup and monitoring of hazardous waste sites: the Hazardous Substance Response Trust Fund, sections 211, 221, 42 U.S.C. §§ 9621 and 9631; and the Post-Closure Liability Fund, sections 107(k), 111(j) and 232, 42 U.S.C. §§ 9607(k), 9611(j) and 9641. After noting the specific inadequacies of RCRA, Congress stated, "It is the intent of the Committee in [CERCLA] ... to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 1016, *supra,* at 22, *reprinted in* [1980] U.S. Code Cong. & Ad. News at 6125. *See Price,* No. 80-4104, slip op. at 12. Suffice it to say in sum-

mary, section 102 [42 U.S.C. § 9602] requires the government to promulgate a list of hazardous substances, section 103 [42 U.S.C. § 9603] requires that the release from vessels and facilities of wastes be reported to the EPA, section 104 [42 U.S.C. § 9604] grants the federal authorities[14] broad authority to respond to hazardous waste pollution by cleaning up the source and mitigating its effects, section 106 [42 U.S.C. § 9606] is an imminent hazard provision similar to RCRA's section 7003 [42 U.S.C. § 6973], and section 107 [42 U.S.C. § 9607] lists those responsible for the hazardous waste releases as well as what they are responsible for.[15]

A. Retroactive Application of CERCLA to Non-negligent Past Off-Site Generators and Transporters

Defendants contend that sections 104, 106(a) and 107(a), 42 U.S.C. §§ 9604, 9606(a) and 9607(a), are not to be given retroactive application, and if applied retroactively, the statutes are in violation of constitutional due process. The Court finds the defendants' arguments without merit.

It is a well settled rule of law that legislation is presumed to apply prospectively and that it is the plaintiff's burden of proof to show that the statute is to be given retroactive effect. *Greene v. United States,* 376 U.S. 149, 160 (1964) ("unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *Id.*); and *Alyeska Pipeline Service Co. v. United States,* 624 F.2d 1005, 1013 (Ct. Cl. 1980). The Court agrees that the appropriate definition of retroactive application is, "one which '...creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past....' " *State ex rel. Brown v. Georgeoff,* 562 F.Supp. 1300, 1303 (N.D. Ohio 1983), quoting Justice Story in *Society for Propagating the Gospel v. Wheeler,* 22 F.Cas. 756, 767 (C.C.D. N.H. 1814) (No. 13,156).

There can be little doubt that sections 104 and 107(a) were intended to apply retroactively. A brief review of the case law and

legislative history clearly supports this proposition. It was the precise inadequacies resulting from RCRA's lack of applicability to inactive and abandoned hazardous waste disposal sites that prompted the passage of CERCLA. This Court concludes that sections 104 and 107(a) of CERCLA were intended to apply retroactively. *Georgeoff,* 562 F.Supp. at 1302-12; *Waste Industries,* 556 F.Supp. at 1316-17; *Wade,* 546 F.Supp. at 792-93; and *Stepan Chemical Co.,* 544 F.Supp. at 1140-41.

A more perplexing issue is the application of section 106(a) to inactive or abandoned hazardous waste disposal sites. Section 106(a) is similar to section 7003 of RCRA in that they are both emergency provisions, but this Court notes several critical differences. Section 106(a) authorizes judicial action when an imminent and substantial endangerment to the public health, welfare or the environment *is caused by an actual or threatened release of hazardous waste.* Although the statutory language does not explicitly refer to inactive sites, Congress made this explicitly clear.[16] The Court finds that section 106(a) applies to inactive sites and that the same persons listed as liable under section 107(a) are liable under section 106(a). *United States v. Reilly Tar & Chemical Corp.,* 546 F.Supp. 1100, 1112-13 (D. Minn. 1982); and *United States v. Outboard Marine Corp.,* 556 F.Supp. 54, 56 (N.D. Ill. 1982). To read sections 104, 106(a) and 107(a) otherwise would be to emasculate the purpose of CERCLA and the intent of Congress. H.R. Rep. No. 1016, *supra,* at 17, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119.[17]

The defendants argue that if CERCLA is applied retroactively then it violates the Fifth Amendment Due Process Clause. The fact that a statute has retroactive application does not make it unconstitutional. Once it has been determined that Congress intended the statute to apply retroactively, the statute is presumed constitutional.

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the

> Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an *arbitrary and irrational way.*

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (emphasis added). The defendants must therefore prove that Congress acted arbitrarily and irrationally in the passage of CERCLA.

In *Turner Elkhorn Mining Co.* the defendants challenged the constitutionality of a provision in Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Ling Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.* (1970 ed. & Supp. IV), requiring the payment of benefits with respect to miners who left employment in the industry before the effective date of the Act. The Court held the statute constitutional because Congress acted in a rational manner in formulating the provisions. *Id.* at 18. Indeed, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations [citations omitted]. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts [citations omitted]." *Id.* at 16.

It is clear that Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites. 126 Cong. Rec. S14,962, S14,963 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph); *id.* at S14,966 (remarks of Sen. Stafford); *id.* at S14,972 (remarks of Sen. Tsongas); and 12 Cong. Rec. Hll,799 (daily ed. Dec. 3, 1980) (remarks of Rep. Jeffords). Congress rationally considered the imposition of liability for the effects of past disposal practices as a means to spread the costs of the cleanup on those who created and profited from the waste disposal-generators, transporters, and disposal site owners/operators. *See also Georgeoff*, 562 F.Supp. at 1312; and S.Rep.No. 848, 96th Cong., 2d Sess. 12 and 33-34, *reprinted in* [1980] U.S. Code

Cong. & Ad. News 6119. Accordingly, as in *Turner Elkhorn Mining Co.*, CERCLA's imposition of liability for past acts is rational and satisfies the Due Process Clause of the Fifth Amendment.[18]

Defendants contend that the provisions of CERCLA were not intended to apply retroactively to costs incurred prior to the effective date of CERCLA, December 11, 1980, 42 U.S.C. § 9652(a). The plaintiff rebuts this contention by first arguing that CERCLA specifically states that those liable under CERCLA, "shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan . . . 42 U.S.C. § 9607(a); therefore, implying that defendants are liable for all costs regardless of when incurred. Second, plaintiff suggests that Congress specifically intended CERCLA be given retroactive effect to costs incurred, since Congress failed to include a provision limiting such recovery in § 9607(a). Finally, plaintiff contends that the legislative history supports retroactive application to costs incurred. Although the Court has held that CERCLA applies to past acts of generators and transporters, rendering them liable for response costs incurred in cleaning up inactive hazardous waste sites, the prayer for response costs incurred prior to CERCLA's enactment is a separate and distinct new duty from the obligation of post-CERCLA liability for past acts.

Axiomatic, if the language of the statute is plain and unambiguous, then it controls. Section 302 of CERCLA, 42 U.S.C. § 9652 states, in pertinent part:

> (a) Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980.
>
> (c) Any regulation—
>
> (1) respecting financial responsibility,
>
> (2) issued pursuant to any provision of law repealed or superseded by this chapter, and

> (3) in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.
>
> (d) Nothing in this chapter shall affect or modify in any way the obligations or liabilites of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. . . .

Clearly, CERCLA became effective on December 11, 1980 and does not modify financial responsibilities or duties under prior laws *unless* specifically done so by provision. The Court in *Georgeoff* previously noted that certain "provisions of CERCLA support the view that CERCLA applies to pre-enactment conduct." 562 F.Supp. at 1311. Those provisions are sections 104(c)(3), 107(f) and 111(d)(1), 42 U.S.C. §§ 9604(c)(3), 9607(f) and 9611(d)(1). The plaintiff argues the same observations made in *Georgeoff,* 562 F.Supp. at 1311:

> CERCLA authorizes reimbursements from the Superfund for response costs arising before CERCLA's enactment, *indicating that at least some* of the provisions of CERCLA apply retroactively. Finally, the § 9607(f) prohibition on recovery for injuries to natural resources occurring before CERCLA's enactment *suggests, by implication,* that a similar prohibition does not apply to other response costs.

Id. (emphasis added). This Court, as the court in *Georgeoff,* 562 F.Supp. at 1311-12, concludes that the statutory language is not equivocal as to the intent of Congress. The statutory language "all costs . . . incurred . . ." 42 U.S.C. § 9607(a), is susceptible to varying interpretations, either all costs incurred regardless of when incurred or all costs incurred from the date of enactment. The national contingency plan makes no provision for the recovery of pre-CERCLA response costs. 40

C.F.R. Part 300 (1983). References to time limitations placed in sections 104(c)(3), 107(f) and 111(d)(1) could equally indicate that these are the only provisions in which pre-CERCLA costs may be recoverable. Most importantly, there is no clear and affirmative statement in the statute allowing for recovery of pre-enactment response costs.

The only substantive discussion of the retroactive application of CERCLA to the costs incurred is concerning the originally drafted senate version of CERCLA, S.1480, as reported out of the Senate Committee on Environmental and Public Works, 126 Cong. Rec. S.1480 (daily ed. July 11, 1980). The bill contained an amendment introduced by Senator Dominici which became section 4(n) of S.1480.[19] The Senate version contained provisions concerning liability for removal costs, section 4(a)(2), S.1480. Section 4(n) speaks to those liability provisions under section 4(a)(2). The discussions concerning limits of liability specifically dealt with section 4(a)(2) and not section 4(a)(1). As noted by plaintiff, the Senate Report accompanying S.1480 states, "Section 4(n) specifies how claims for certain damages occurring before the date of enactment will be handled under S.1480. Costs of removal (cleanup and containment) are not affected by this provision, nor are any damages associated with continuing releases." Committee on Environment and Public Works, S.1480. S.Rep.No.848, 96th Cong., 2d Sess. 344 (1980). Indeed, the plaintiff quotes Senator Dominici, explaining that the purpose of section 4(n), "is that those kinds of damages become part of causes of action or costs of removal and, therefore, are not affected by the retroactive limitations.' Transcript of Senate Committee on Environment and Public Works Mark-Up of S.1480, 194-195 (June 6, 1980)." In conclusion, plaintiff suggests that in the absence of specific limitations on liability for costs of removal or remedial actions, a party is liable for such costs regardless of when they are incurred so long as they are not shown to be inconsistent with the national contingency plan.

The legislative history is unpersuasive. Sections 4(a)(2) and 4(n) of S.1480 were essentially deleted from the enacted compromise bill. The only real reference in CERCLA to special damages concerns destruction and loss of natural resources. Section 107(a)(C) and 111(d)(1), 42 U.S.C. §§ 9607(a)(C) and 9611(d)(1). As noted previously, CERCLA is not the ultimate tool intended by its sponsors. In fact, the original senate proposal, S.1480, was severely compromised by the final enactment.[20] The lone statement of Senator Dominici falls short of establishing that Congress intended to hold possibly hundreds of past transporters and generators liable for pre-CERCLA response costs, without limit in time or amount. Of equal importance is the lack of discussion in the House concerning the retroactive application of CERCLA to pre-enactment response costs.[21] Although the Court is cognizant of Congress' intent to hold the past generators and transporters liable for the costs incurred in cleaning up the results of inactive hazardous disposal sites,[22] in view of the repeated references to the millions of dollars the government and others have spent on the cleanup of inactive hazardous disposal sites prior to CERCLA and other procedural and substantive inadequacies of pre-CERCLA statutes, it is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports or floor debates. *Alyeska Pipeline Service Co. v. United States,* 624 F.2d 1003, 1016 (Ct. Cl. 1980). Although it was possible for Congress to legislate the liability of past generators and transporters for pre-CERCLA response costs, they did not, and this Court does not deem it advisable to engage in judicial legislation concerning a statute of such importance and controversy. All doubts of retroactive application must be resolved in favor of the defendants; therefore, the defendants are not liable for pre-CERCLA response costs.

B. Standard of Liability—Strict Liability

Defendants argue that negligence should be the standard for liability under CERCLA, sections 104, 106(a) and 107(a);

whereas, the plaintiff advocates a standard of strict liability. Defendants are correct in noting that CERCLA does not explicitly contain a strict liability provision and, more importantly, the specific strict liability provision contained in the original Senate bill was deleted from the statute as enacted. Presently, section 107(a), after listing the categories of liable persons, reads, "shall be liable" instead of the stricter Senate proposal which read "shall be jointly, strictly, and severally liable." S.1480, 96th Cong., 2d Sess., *reprinted in, The Environmental Emergency Response Act: Hearing Before the Senate Comm. on Finance on S.1480,* 96th Cong., 2d Sess. 5 (1980). *See also* 38 Cong. Q. Weekly Rep. 3436 (Nov. 29, 1980); and 126 Cong. Rec. Hll, 787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio). This Court finds that section 101(32), 42 U.S.C. § 9601(32) provides for strict liability of past non-negligent off-site generators and transporters, when it states: " 'liable' or 'liability' under this chapter shall be construed to be the standard of liability which obtains under [section 311 of the Federal Water Pollution Control Act (FWPCA) (commonly referred to as "the Clean Water Act of 1977"), 33 U.S.C. § 1321 (1981)]." Congress' reference to § 1321 appears quite logical since the same defenses to liability found in 42 U.S.C. § 9607(b) are also found in § 1321 as a strict liability provision. *United States v. M/V Big Sam,* 681 F.2d 432 (5th Cir. 1982), *on petition for rehearing and suggestions for rehearing en banc,* 693 F.2d 451 (5th Cir. 1982); *United States v. LeBeouf Bros. Towing Co.,* 621 F.2d 787 (5th Cir. 1980), *cert. denied,* 452 U.S. 906 (1981); *Steuart Transportation Co. v. Allied Towing Corp.,* 596 F.2d 609 (4th Cir. 1979); *United States v. Tex-Tow, Inc.,* 589 F.2d 1310 (7th Cir. 1978); and *Burgess v. M/V Tamano,* 564 F.2d 964 (1st Cir. 1977); and *City of Philadelphia v. Stepan Chemical Co.,* 544 F.Supp. 1135, 1140 n.4 (E.D. Pa. 1982).[23] Since this Court has already concluded that section 106(a) applies to past off-site generators and transporters, as does sections 104 and 107(a), the standard for liability, strict liability, applies equally to all three sections. The Court finds the defendants can be liable under the theory of

strict liability, pursuant to sections 104, 106(a) and 107(a) of CERCLA.

C. Joint and Several Liability

Defendants contend, inter alia, that liability of the parties should be based on the relative fault and causation of the parties resulting in the imminent and substantial endangerment, whereas, the plaintiff contends that liability is joint and several. As noted above the final language of Section 107(a), 42 U.S.C. § 9607(a), "shall be liable for" differs dramatically from the stricter standard imposed by Senate proposal S.1480, calling for joint and several liability. This was part of the hastily drawn compromise which resulted in the enactment of CERCLA.[24] Although explicit reference to joint and several liability was deleted from the final enactment, this Court finds that joint and several liability is at least permissible, if not mandated, under the facts of this case. Senator Jennings Randolph, stated during the debates on the compromise bill:

> We have kept strict liability in the compromise . . . but we have deleted any reference to joing and several liability, relying on common law principles to determine when parties should be severally liable.
>
> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. . . . [T]he liability of joint tortfeasors will be determined *under common or previous statutory law.*

126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980) (emphasis added).[25] Whether the specific standard is to be found in section 311 of FWPCA, 33 U.S.C. § 1321, as set forth in section 101(32) of CERCLA, 42 U.S.C. § 9601(32), or the common law of the states, the Court finds to be an oversight of statutory and legislative guidance. The congressional statements, as noted above, could lead to both. Granted this issue may be of pin-

nacle importance in cases involving numerous generators, transporters, site owners and a different state's law; however, the Court deems it unnecessary to address this issue under the facts of the case at bar, which involve one generator, one transporter and one landowner in the State of Missouri. The Court concludes that the imminent and substantial endangerment posed by the Denney farm site was the act of the defendants working in concert to produce a single indivisible harm and they are therefore jointly and severally liable for the response costs incurred by the plaintiff, and for which plaintiff is entitled to recover. Under this finding, the defendants would be jointly and severally liable pursuant to the law of Missouri. *Stafford v. Muster,* 582 S.W.2d 670, 677 (Mo. en banc 1979). Section 311 of FWPCA, 33 U.S.C. § 1321, has also been construed to allow joint and several liability. *See United States v. M/V Big Sam,* 681 F.2d 432, 438-39 (5th Cir. 1982), *on petition for rehearing and suggestions for rehearing en banc,* 693 F.2d 451 (5th Cir. 1982); *United States v. Hollywood Marine, Inc.,* 519 F.Supp. 688, 692 (S.D. Tex. 1981); and *United States v. Bear Marine Services,* 509 F.Supp. 710, 718-19 (E.D. La. 1980).[26]

D. Imminent and Substantial Endangerment—Section 106(a), 42 U.S.C. § 9606(a)

Plaintiff bases this action, in part, on section 106(a) of CERCLA, 42 U.S.C. § 9606(a), which states, in pertinent part:

> (a) Maintenance, jurisdiction, etc.
>
> . . . when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States . . . shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. . . .

The listings of hazardous waste include: 2,4,5-Trichlorophenol (TCP)-U230; Hexachlorophene-U-132; Toluene-U220; and 1,2,4,5-Tetrachlorobenzene (TCB)- U-207. 40 C.F.R. Part 261 (1980) and 40 C.F.R. Part 300 (1982). The Court finds that these compounds and 2,3,7,8-tetrachlorodibenzo-p-dioxin (dioxin or TCDD) are hazardous wastes within the meaning of 42 U.S.C. § 6903(5) and 42 U.S.C. § 9601(14). This finding is based upon the high toxicity of these compounds at relatively low dosage levels, as noted in this Court's initial findings of fact.

Although the phrase "imminent and substantial endangerment" lacks specific definition in CERCLA, this Court is not without guidance in its query. Section 106(a) is one of several imminent hazard provisions included in environmental statutes by Congress.[27] The standard for the application of section 7003 is a case-by-case assessment of the relationship between the magnitude of risk and harm arising from the presence of the hazardous waste.[28] The Court finds that the plaintiff has met its burden of proof, the Denney farm site presented an imminent and substantial endangerment to health and the environment. The quantities of dioxin and other compounds found at the Denney farm site were highly toxic at low dosage levels and given the conditions of the soil and bedrock beneath the site, there was a substantial likelihood of human and environmental exposure.

III. Liability of the Defendants

Having found that there was a release and a threat of continued release of hazardous waste from the Denney farm site that constituted an imminent and substantial endangerment to health and the environment, the Court will address the issue of whether the defendants are persons liable under sections 104, 106(a) and 107(a), 42 U.S.C. §§ 9604, 9606(a) and 9607(a). Each defendant will be dealt with separately.

Mills

Defendant Mills was an independent contractor who contracted with representatives of NEPACCO to transport the hazardous waste from their facility to the Denney farm site. Defendant Mills had previously selected the Denney farm site and contracted with James Denney to deposit the hazardous waste at a specific price. The Court finds that defendant Mills is strictly liable pursuant to sections 101(26), 104, 106(a) and 107(a)(4), 42 U.S.C. §§ 9601(26), 9604, 9606(a) and 9607(a)(4) as a transporter of hazardous waste. Defendant Mills was not represented at trial by counsel and did not allege or prove the existence of any defense to liability. Section 107(b), 42 U.S.C. § 9607(b).

NEPACCO

NEPACCO is the corporate entity that contracted through corporate representatives with defendant Mills for the transport and disposal of the hazardous waste at the Denney farm site. NEPACCO is a "person" as defined by section 101(21), 42 U.S.C. § 9601(21), and is therefore strictly liable for the Denney farm site cleanup pursuant to sections 104, 106(a) and 107(a)(1) and (3), 42 U.S.C. §§ 9604, 9606(a) and 9607(a)(1) and (3). *See Apex Oil Co. v. United States,* 530 F.2d 1291 (8th Cir. 1976) (construing 33 U.S.C. § 1321). The Court finds that NEPACCO failed to prove any defense to liability. Section 107(b), 42 U.S.C. § 9607(b).

Lee

Defendant Lee, vice president of NEPACCO and immediate supervisor of the Verona facility, was directly responsible for arranging the disposal and transport of the hazardous waste at the Denney farm site. Defendant Lee had direct knowledge and supervision of the contract with defendant Mills and the ultimate disposal site. Defendant Lee assisted in the selection of the Denney farm site by instructing defendant Mills on the

disposal site characteristics favorable for hazardous waste disposal.

Defendant argues correctly that corporate officers are normally not personally liable for acts of the corporate entity. Specifically, the defendant contends that he neither owned nor possessed the hazardous waste, since technically the corporate entity, NEPACCO, had the ownership rights to the hazardous waste. In addition, at trial the defendant alleged that the hazardous waste substance contained in the barrels dumped at Denney farm site was actually manufactured by Hoffman-Taff as a by-product of their agent orange process. Several of the barrels containing the Hoffman-Taff wastes were left at the facility when NEPACCO leased the property. These barrels were subsequently placed in the northwest storage site along with those barrels containing waste from NEPACCO. The Court finds these arguments of little significance to the imposition of liability. Defendant Lee had actual knowledge of the Hoffman-Taff drums and their storage at the northwest storage site. First, defendant Lee possessed the barrels of hazardous wastes within the meaning of section 107(a)(3). As previously noted he had direct supervision and knowledge of the disposal of these barrels. Second, the person arranging for the disposal of the hazardous waste is not required to actually own or possess the hazardous waste. Section 107(a)(3) states:

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter to transport for disposal or treatment, of hazardous substances *owned or possessed* by such *person, by any other party or entity, at any facility owned or operated by another party or entity* and containing such hazardous substances. . . .

42 U.S.C. § 9607(a)(3). The provision clearly states that the person arranging for the disposal is not required to actually own or possess the hazardous waste or the facility from which it is mov-

ed for disposition. Since defendant Lee arranged for the disposal and transport of the hazardous waste, he is liable under section 107(a)(3), regardless of-whether he actually owned or possessed the hazardous waste substance or facility. Defendant Lee is a "person" within the definition found in section 101(21), 42 U.S.C. § 9601(21). An analogous situation was dealt with by the Eighth Circuit in *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir. 1976), construing the statutory language of 33 U.S.C. § 1321(b)(5) and (6). The Court held in *Apex Oil Co.* that a "person in charge" can include both the individual employee and the corporation. Although the issue in *Apex Oil Co.* was whether an owner-operator (the corporation in that case) could be held liable as a "person in charge," *Id.* at 1292-93, this Court considers the Eighth Circuit's analysis significant in defining an employee's liability under CERCLA:

> Section 1321(b)(5) speaks in terms of any person in charge. We note that it would not be inconsistent with the statutory language to hold both the employee and the corporation to its penaliies [sic] for failure to report a spill.

Id. at 1293 n. 6. "Person" as defined in 33 U.S.C. § 1321(a)(7) is almost identical to the definition of "person" in 42 U.S.C. § 9601(21). This Court finds that a "person" arranging for the disposal of hazardous substance should be given a liberal interpretation that may include both the employee and corporation. Defendant Lee, acting as an employee, had the responsibility to and did arrange for the disposal of the hazardous waste pursuant to 42 U.S.C. § 9607(a)(3).

Finally, due to defendant Lee's unique position as both vice president in charge of the Verona plant and as a major stockholder, actively participating in NEPACCO's management, he can be classified as both an owner and operator of the NEPACCO plant, pursuant to section 107(a)(1), 42 U.S.C. § 9607(a)(1). 42 U.S.C. § 9601(20)(A) states that an "owner or operator":

> means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility. . . . Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his interest in the . . . facility. . . .

The statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste.[29] Such a construction appears to be supported by the intent of Congress. CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up.[30] Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up. The Eighth Circuit adopted the definition given "owner or operator", 33 U.S.C. § 1321(a)(6), by the Fifth Circuit in *United States v. Mobil Oil Corporation,* 464 F.2d 1124, 1127 (5th Cir. 1972):

> *The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage.* Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a 'person in charge' of the facility for the purposes of § 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it.
>
> * * * *

Apex Oil Co., 530 F.2d at 1293 (emphasis added). Defendant Lee had the capacity to control the disposal of hazardous waste

at the NEPACCO plant; the power to direct the negotiations concerning the disposal of wastes at the Denney farm site; and the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the Denny farm site. Finally, Lee was a major stockholder in NEPACCO and actively participated in the management of NEPACCO in his capacity as vice-president. The Court finds that the evidence presented is sufficient to impose liability on Lee as an "owner and operator" pursuant to section 107(a))1), 42 U.S.C. § 9607(a)(1). To hold otherwise and allow Lee to be shielded by the corporate veil "would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA]." *Id.*

Michaels

Michaels was present and supervised the construction and operation of the Verona plant for one year (1970) prior to returning to his home state, Connecticut. He was not present at the Verona plant during the disposal of hazardous waste at the Denney farm site. Michaels made frequent visits to the Verona plant in order to check on its operations. Although defendant Lee frequently reported to Michaels concerning the plant's operations, the plaintiff failed to establish that Michaels had prior direct knowledge of the proposed plan to dispose of hazardous wstes at the Denney farm site. Michaels was aware of and actively participated in previous negotiations concerning the disposal of hazardous waste with Rollins-Purle and IPC. It was not established whether NEPACCO was under contract with IPC at the time of the Denney farm disposal. Michaels was aware of the dangers resulting from exposure to dioxin and other hazardous substances. Michaels and defendant Lee were very concerned about establishing and maintaining safety precautions against exposure to these substances. Michaels was the founder and president of the NEPACCO operation in Verona, as well as, a major stockholder in the corporation. Michaels had the capacity and general responsibility as presi-

dent to control the disposal of hazardous waste at the NEPACCO plant; the power to direct the negotiations concerning the disposal of wastes at the Denney farm site; and the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the Denney farm site. *See Apex Oil Co.*, 530 F.2d at 1293, quoting with favor *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972). In view of these factors, the Court finds that defendant Michaels is strictly liable as an "owner and operator" of the Verona facility for the response costs incurred pursuant to section 107(a)(1), 42 U.S.C. § 9607(a)(1). Michaels satisfies all the requirements of an "owner or operator" under 42 U.S.C. § 9601(20)(A) and (21). The same policy considerations expressed by Congress holding defendant Lee liable would also necessitate the imposition of liability on Michaels.[31]

Since this Court has previously found that the list of parties and response costs in section 107(a) are to be applied in determining liability under section 106(a), all four defendants are jointly and severally liable for those response costs incurred pursuant to section 106(a), 42 U.S.C. § 9606(a).

IV. Recoverable Response Costs

The final issue is to determine the response costs for which the defendants are liable under sections 104, 106(a) and 107(a). Section 107(a)(4)(A) states that the parties shall be liable for, "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). Section 106(a) grants this Court the power to provide "such relief as may be necessary to abate such danger or threat" caused by the hazardous waste site and "such relief as the public interest and the equities of the case may require." 42 U.S.C. § 9606(a). Since this Court has previously concluded that the defendants are not liable under section 7003 of RCRA and that liability under CERCLA does not apply to response costs incurred prior to its enactment, the defendants' liability is limited to those response costs incurred after

December 10, 1980. Plaintiff seeks recovery of response costs incurred, including attorney fees, prejudgment interest and a declaratory judgment for future response costs.

With regard to the government's response costs incurred, these activities would include:

> (a) Investigations, monitoring and testing to identify the extent of danger to the public health or welfare or the environment.
>
> (b) Investigations, monitoring and testing to identify the extent of the release or threatened release of hazardous substances.
>
> (c) Planning and implementation of a response action.
>
> (d) Recovery of the costs associated with the above actions, and to enforce the provisions of CERCLA, including the costs incurred for the staffs of the EPA and the Department of Justice.

The language of CERCLA confirms that the government has very broad cost recovery rights. The fact that there is not a claim before this Court seeking recovery on behalf of the fund does not bar recovery by the plaintiff. An action brought pursuant to sections 106(a) and 107(a) are independent and separate of the provisions authorizing use of the Superfund, sections 104(c)(3) and 111. The plaintiff is not required to present a claim to the fund, nor enter into a cooperative agreement with the state of Missouri, prior to bringing suit under sections 106(a) and 107(a). *Georgeoff,* 562 F.Supp. at 1315; and *Reilly Tar & Chemical Co.,* 546 F.Supp. at 1117-18. The language of section 107(a) makes this finding explicitly clear, "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of the section. . . ."

Defendants argue that the plaintiff failed to prove that the costs incurred were reasonable and "not inconsistent with the

national contingency plan." Initially, the Court finds that the burden of proving inconsistency with the national contingency plan was that of the defendants. This conclusion is evident from the language of the statute. To give meaning to every term in the statute, the Court reads the insertion of the word "not" immediately prior to "inconsistent" to mean that the defendants are presumed liable for all response costs incurred *unless* they can overcome this presumption by presenting evidence of inconsistency. The content of section 107(a)(4)(B) lends support to this conclusion in stating that responsible parties are liable for "any other costs of response incurred by any other person *consistent with* the national contingency plan. . . ." (emphasis added). On its face, section 107(a)(4)(B) intends that a different standard apply to cost recovery by nongovernmental entities and that such entities must affirmatively show that their actions were consistent. Clearly, the standard as set forth by section 107(a)(4)(A) is that the costs incurred must be "not inconsistent with the national contingency plan." Apparently, Congress considered the different standards and specifically set forth that nongovernmental entities must prove their costs incurred were both "necessary" and "consistent," section 107(a)(4)(B), and that costs incurred due to assessing the injury, destruction, or loss of natural resources be "reasonable," section 107(a)(4)(C). Congress has already made provision for the reasonableness of the actions taken by the government. Section 105, 42 U.S.C. § 9605, mandated that a national contingency plan be published and that statute explicitly sets forth the guidelines governing the formulation of the procedures and standards for responding to releases of hazardous substances. Once the national contingency plan was published, Congress stated that "the response to and actions to minimize damage from hazardous substance releases shall, *to the greatest extent possible,* be in accordance with the provisions of the plan." Section 105, 42 U.S.C. § 9605 (emphasis added). Reasonableness is conclusively presumed to have been built into the plan since one of the guidelines expressed by Congress was that the plan pro-

vide a "means of assuring that remedial action measures are cost-effective over the period of potential exposure. . . ." Section 105(7). As long as the actions taken by the government were in harmony with the national contingency plan, the costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable. If Congress had intended otherwise, they would have merely stated in section 107(a)(4)(A), "all reasonable costs," instead of the present language of "all costs."[32] The Court finds that the defendants have failed to prove that the costs incurred by the government were inconsistent with the national contingency plan. In addition, a review of the remedial and removal actions taken by the government leads this Court to conclude that such actions were consistent with the national contingency plan. 40 C.F.R. Part 300 (1982).

The defendants argue that the government cannot recover the attorney fees incurred in the prosecution of this action. It is well settled law that a party cannot recover attorney fees unless provided for by contract or statute. *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 262 (1975); *Bagby v. Merrill Lynch, Pierce, Fenner and Smith, Inc.,* 491 F.2d 192 (8th Cir. 1973); and *City of Grandview v. Hudson,* 377 F.2d 694 (8th Cir. 1967). The Court finds that CERCLA specifically allows for the recovery of attorney fees. Under CERCLA section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), responsible parties are liable for "all costs of removal or remedial action. . . ." Section 101(23) defines "remove" or "removal" to mean, inter alia, "action taken under section 9604(b). . . ." 42 U.S.C. § 9601(23). Section 104(b) states, in pertinent part:

> Whenever the President is authorized to act pursuant to subsection (a) of this section . . . [he] may undertake such *planning, legal,* fiscal, economic, engineering, architectural, and *other studies or investigations* as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9604(b) (emphasis added). Accordingly, since the plaintiff acted pursuant to section 104(a), the Court finds that under CERCLA, the defendants are jointly and severally liable for, and the plaintiff is entitled to recover, all litigation costs, including attorney fees, incurred by plaintiff. The Court further finds that the defendants are jointly and severally liable to the plaintiff for all costs, including salaries and expenses,[33] incurred by plaintiff associated with such activities as monitoring, assessing and evaluating the release of contaminants and the taking of actions to prevent, minimize or mitigate damage which might result from a release or threat of release of contaminants from the Denney farm site.

Plaintiff seeks the award of prejudgment interest. In the absence of statutory provision the granting of prejudgment interest lies within the discretion of the Court. *Mid-America Transportation Co., Inc. v. Rose Barge Line, Inc.*, 477 F.2d 914 (8th Cir. 1973); and *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988 (6th Cir. 1982). Although CERCLA does not specifically address the issue of prejudgment interest, the Court finds the Sixth Circuit's analysis in *Bricklayers' Pension Trust Fund v. Taiariol* of assistance, in stating:

> In the absence of legislative direction, the Supreme Court, again in [*Rodgers v. United States,* 332 U.S. 371 (1947)], directed that the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purposes underlying the obligations imposed by the statute in question. 332 U.S. at 373, 68 S.Ct. at 6.

Bricklayers' Pension Trust Fund, 671 F.2d at 989. In determining this issue, the Court must be mindful of the Congressional intent to impose liability on those responsible parties for "all costs" incurred in taking remedial and removal action. It was the intent of Congress that CERCLA be given a broad interpretation so as not to restrict the liability of those responsible parties.

It is also well established that prejudgment interest is compensatory in nature, not punitive. An award of prejudgment interest is not foreign to actions involving environmental statutes. *United States v. M/V Zoe Colocotroni*, 602 F.2d 12, 14 (1st Cir. 1979); *United States v. Hollywood Marine, Inc.*, 519 F.Supp. 688 (S.D. Tex. 1981); and *United States v. Malitovsky Cooperage Co.*, 472 F.Supp. 454, 458 (W.D. Pa. 1979). Considering the intent of Congress and the equities involved in this case, the Court finds the defendants jointly and severally liable to plaintiff for prejudgment interest at the rate of 9% per annum which is in accordance with Missouri's post-judgment interest statute, V.A.M.S. § 408.040. The interest shall be calculated from August 19, 1982, the date the amended complaint was filed. The original complaint was filed August 1, 1980 pursuant to section 7003 of RCRA. Since the Court has held the defendants not liable under section 7003, it would not be appropriate to calculate interest from August 1, 1980. Although the defendants are liable for response costs incurred past December 10, 1980, the Court is unaware of a demand on the defendants for the response costs pursuant to CERCLA prior to the filing of the amended complaint on August 19, 1982.

The plaintiff filed a motion for a declaratory judgment pursuant to Fed.R.Civ.P. 57 seeking entitlement to recover its future response costs associated with the Denney farm site. Granting declaratory relief is within the discretion of the Court. C. Wright & A. Miller, *Federal Practice and Procedure*, § 2759 (2d ed. 1983). The Court finds that granting plaintiff declaratory relief would be of benefit to all parties concerned. The issues have been firmly established and there is a real, present controversy between the plaintiff and defendants. While the Court cannot award costs until they are incurred, the Court can presently determine liability for future costs. *Georgeoff*, 562 F.Supp. at 1315. Plaintiff established that it has already incurred thousands of dollars in costs and has proven that it ex-

pects to incur future costs in monitoring and assessing the maintenance of hazardous waste at the Denney farm site. Accordingly, the Court concludes that the defendants are jointly and severally liable for all future costs of removal or remedial action incurred by the plaintiff relative to the Denney farm site that are not inconsistent with the national contingency plan.

Accordingly, for the reasons above, it is hereby

ORDERED that judgment is granted in favor of defendants on Count I of the amended complaint; and it is further

ORDERED that plaintiff's motion for declaratory relief is granted and therefore the defendants are jointly and severally liable for all future costs of removal or remedial action incurred by the plaintiff relative to the Denney farm site that are not inconsistent with the national contingency plan; and it is further

ORDERED that the plaintiff shall within thirty (30) days from the entry of this order submit an itemization of the costs incurred by plaintiff after December 10, 1980, at which time the defendants shall be granted twenty (20) days to respond to the plaintiff's itemization of costs incurred; and it is further

ORDERED that defendants' motion to strike plaintiff's reply brief is granted; and it is further

ORDERED that upon a determination of the amounts which plaintiff is entitled to recover, judgment will be entered in favor of plaintiff and against defendants on Counts II and III of the amended complaint.

Russell G. Clark, Chief Judge
United States District Court

Dated: January 31, 1984

APPENDIX

1. Defendant NEPACCO raises the issue of whether NEPACCO as an entity has the capacity to be sued, citing *J. M. Morris Const. Co. v. Mid-West Precote Co.*, 613 S.W.2d 180 (Mo. App. 1981) for the proposition that under Missouri law a corporation that has forfeited its charter cannot sue or be sued. Defendant contends that this Court mistakenly applied Delaware law to the issue in this Court's prior order entered September 27, 1982, and the, even if Delaware law should be applied, such law would not support the finding that NEPACCO had the capacity to be sued. A careful review of the statutory and case law, leads this Court to conclude that both arguments are without merit. It is well settled in federal courts that the capacity "to sue or be sued shall be determined by the law under which it is organized." Fed.R.Civ.P. 17(b). *Moore v. Matthew's Book Co., Inc.*, 597 F.2d 645, 646-647 (8th Cir. 1979). The same is true under Missouri common law. *Molasky Enterprises, Inc. v. Carps, Inc.*, 615 S.W.2d 83, 86-87 (Mo. App. 1981); and *Pacific Intermountain Express v. Best Truck Lines, Inc.*, 518 S.W.2d 469, 472 (Mo. App. 1974). As noted above, NEPACCO was originally incorporated in 1966 under the laws of Delaware and forfeited that charter on August 22, 1976, but failed to file a certificate of voluntary dissolution with the Delaware Secretary of State. 8 Del. Code §§ 103, 275. The law of Delaware controls on the issue of NEPACCO's capacity to sue or be sued; therefore, there is no conflict with V.A.M.S. § 351.525. The law of Delaware is succinctly stated in *Ross v. Venezuelan-American*, 230 F.Supp. 701 (D. Del. 1964), adopting the rationale of *Wax v. Riverview Cemetary Co.*, 41 Del. 424, 24 A.2d 431 (1942), holding that a corporation with a forfeited charter is not completely dead for all purposes, but merely in "a state of coma," during which it is still subject to suit, even if the suit is brought more than three years after the charter forfeiture. 8 Del. Code § 312(b).

2. Defendants contend that since the EPA and Syntex have entered into a consent decree concerning the cleanup of the Denney farm site, this action should be dismissed as moot. The Court finds this argument without merit. This is an action for the recovery of costs incurred by the plaintiff, not Syntex. The relief granted in the consent decree does not concern the costs sought in this action.

3. Plaintiff cites in support of this argument: *United States v. Price,* 688 F.2d 204 (3d Cir. 1982); *United States v. Reilly Tar & Chemical Corp.,* 546 F.Supp. 1100 (D. Minn. 1982); *United States v. Price,* 523 F.Supp. 1055 (D. N.J. 1981); *United States v. Price,* No. 80-4104 (D. N.J. July 28, 1983); and *United States v. Diamond Shamrock Corp.,* No. C80-1857 (N.D. Ohio May 29, 1981).

4. H.R.Rep.No. 1016, 96th Cong., 2d Sess. 17, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119, 6120. *See generally* Note, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?,* 18 New England L.Rev. 109, 112 (1982); Costle & Beck, *Attack on Hazardous Waste: Turning Back the Toxic Tide,* 9 Cap.U.L.Rev. 425, 432 (1980); and Goldfarb, *The Hazardous Waste Policy,* 19 Nat. Resources J. 249, 253 (1979). *See also* A. Sutherland, 2A *Statutes and Statutory Construction,* § 4605, 56 (4th ed., Sands Ed. 1973) (Statutes should be construed as a whole, not in part).

5. In fact, some consideration was given by Congress to remedying the harms of past disposal practices as set forth in the "Inflationary Impact Statement" accompanying RCRA:

> The Committee also considered the potential costs incurred with the cleanup of underground aquifers, which are the source of drinking water for approximately 50 percent of our population, and the cost of providing new alternate water supplies. The Committee found that eliminating the source of underground water pollution appeared to be

> much more cost effective and less inflationary in the long term than other available alternatives.

H.R.Rep.No. 1491, 94th Cong., 2d Sess. 73, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6312.

6. The only reference to section 7003, contemporaneous with its passage, in the legislative history is found at H.R. Rep. No. 1491, *supra,* at 69, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6308, and merely reiterates that the EPA "may bring suit in the United States District Court, for appropriate relief." No mention of section 7003 or the parties liable thereto appears in the enforcement sections of RCRA. 42 U.S.C. § 6928. This may be explained by the fact that all prior major environmental legislation: Section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300i(a) (1976); Section 504(a) of the Clean Water Act, 33 U.S.C. § 1364(a) (Supp. IV 1980); Section 303 of the Clean Air Act, 42 U.S.C. § 7603 (Supp. IV 1980); and Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9606(a) (Supp. IV 1980), have included emergency provisions such as section 7003 and to do so in RCRA was merely done as a matter of course. *See Waste Industries,* 556 F.Supp. at 1311. Congress did not give considerable thought to the scope of liability under section 7003 at the time of RCRA's passage.

7. *See The Preemptive Scope of the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Necessity for an Active State Rule,* 34 U.Fla.L.Rev. 635, 639 (1982); and *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies,* 9 Ecology L.Q. 599, 599 n.2 (1981).

8. The discussions surrounding the enactment of CERCLA and the amendments to RCRA appear to be much more illustrative of the scope of liability under section 7003. Subsequent legislative history concerning prior legislation is due considerable weight in determining legislative intent. *United States*

v. Solvents Recovery Service of New England, 496 F.Supp. 1127, 1140 n.18 (D. Conn. 1980); and *Waste Industries,* 556 F.Supp. at 1311 n.21 and 1312 (acknowledges weight to be given subsequent legislative history, but adds a caveat).

9. As noted by the court in *Waste Industries,* 556 F.Supp. at 1312, the Eckhardt Report is also subject to numerous internal inconsistencies and interpretations that were found not to be consistent with imposing strict liability on past off-site generators and transporters. *Id.*

10. The legislative history surrounding the passage of CERCLA supports this Court's conclusion. The House Report accompanying the passage of CERCLA states:

> (c) Deficiencies in RCRA have left important regulatory gaps.
>
> (1) [RCRA] is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even then the Act is no help if a *financially responsible owner* of the site cannot be located.
>
> * * * *
>
> It is the intent of the Committee in [CERCLA] to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.

H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 22, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119, 6125 (emphasis added). The Committee reiterated the inadequacies of RCRA in dealing with inactive sites, in stating, "The [EPA] may sue to require cleanup of an inactive disposal site if the site is posing an imminent and substantial hazard to public health. However, this provision does not provide funds for cleanup of inactive sites when the owner is unknown, is not responsible, or is financially unable to pay for these costs." H.R.Rep. No. 1016, Part

II, 96th Cong., 2d Sess. 4, *reprinted in* [1980] U.S. Code Cong. & Ad. News 6151, 6153. *See Waste Industries,* 556 F.Supp. at 1318 and secondary authorities cited therein; and *United States v. Price,* No. 80-4104, slip op. at 12 (D. N.J. July 28, 1983). For a similar analysis of the deficiencies in RCRA, *see Hazardous Waste Disposal: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. pt. 1-4 (1979); Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., *Report on Hazardous Waste Disposal* 3 (Comm. Print 1979); *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping With a Costly Past,* 53 S.Cal. L. Rev. 1709, 1716 (1980); and Goldfarb, *The Hazards of Our Hazardous Waste Policy,* 19 Nat. Resources J. 249 (1979). Even the EPA apparently concurs in this court's conclusion, "We can only exercise [section 7003] where the [site] owner...is identifiable and financially and otherwise able to remedy [the damages].... In addition, if the perpetrator is unknown...cannot be located, cannot afford cleanup, or declares bankruptcy and walks away from the site ...[section 7003] is not an effective tool." *Hazardous and Toxic Waste Disposal: Joint Hearings on S.1341 and S.1480 Before the Subcomm's on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works,* (part 4), 96th Cong., 1st Sess., 7, 43 (1979) (statement of Thomas C. Jorling, Assistant Administrator, Water and Waste Management, EPA). *Accord Wade,* 546 F.Supp. at 791. *See Waste Industries,* 556 F.Supp. at 1314 and n.23 ("agency's view is entitled to substantial deference" (citation omitted)). *See generally* Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms,* 69 Geo. L.J. 1047, 1053-55 (1981).

11. *See United States v. Price,* 688 F.2d 204 (3d Cir. 1982); *United States v. Price,* No. 80-4104 (D. N.J. July 28, 1983); *State ex rel. Brown v. Georgeoff,* 562 F.Supp. 1300 (N.D. Ohio

1983); *United States v. Waste Industries,* 556 F.Supp. 1301 (E.D. N.C. 1982); *United States v. Outboard Marine Corp.,* 556 F.Supp. 54 (N.D. Ill. 1982); *United States v. Wade,* 546 F.Supp. 785 (E.D. Pa. 1982); *United States v. Reilly Tar & Chemical Corp.,* 546 F.Supp. 1100 (D. Minn. 1982); *City of Philadelphia v. Stephan Chemical Co.,* 544 F.Supp. 1135 (E.D. Pa. 1982); *United States v. Hardage,* No. Civ. 80-1031-W (W.D. Okla. Sept. 29, 1982); *United States v. Price,* 523 F.Supp. 1055 (D. N.J. 1981); *McCastle v. Rollins Environmental Services,* 514 F.Supp. 936 (M.D. La. 1981); *United States v. Diamond Shamrock Corp.,* No. C80-1857 (N.D. Ohio May 29, 1981); *United States v. Solvents Recovery Service of New England,* 496 F.Supp. 1127 (D. Conn. 1980); *United States v. Vertac Chemical Corp.,* 489 F.Supp. 870 (E.D. Ark. 1980); and *United States v. Midwest Solvent Recovery, Inc.,* 484 F.Supp. 138 (N.D. Ind. 1980).

12. Although plaintiff contends that the term "disposal" found in section 7003 should include the "leaking" of contaminants into the environment, the Court finds this argument of little significance in determining the parties' liability under 7003. This would not be the case if the ultimate issue was whether section 7003 applied to inactive disposal sites under all circumstances.

13. Federal common law governing hazardous waste disposal has been preempted by subsequent Congressional legislation, RCRA and CERCLA. The Court is therefore without recourse to federal common law in determining the defendants' liability under section 7003 or CERCLA. *Milwaukee v. Illinois* (Milwaukee II), 451 U.S. 304, 31732 (1981); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 22 (1981). *Accord Waste Industries,* 556 F.Supp. at 1314-16; *Outboard Marine Corp.,* 556 F.Supp. at 55-56; *Stepan Chemical Co.,* 544 F.Supp. at 1146-1148; and *Price,* 523 F.Supp. at 1069. *See generally Common Law Nuisance in Hazardous Waste Litigatin; Has It Survived Milwaukee II?,* 13 E.L.R. 10043

(1983); and *The Preemptive Scope of the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Necessity For an Active State Rule,* 34 U.Fla.L.Rev. 635 (1982). *But see generally Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies,* 9 Ecology L.Q. 599, 613-614 (1981) ("federal common law remedies made available" to fill gaps of section 7003. *Id.* at 614).

Neither RCRA, nor CERCLA, require the plaintiff to allege or show interstate effects in order for this Court to have subject matter jurisdiction. *See United States v. Reilly Tar & Chemical Corp.,* 546 F.Sup. 1100, 1107 and 1113 (D. Minn. 1982); *United States v. Price,* 523 F.Supp. 1055, 1070 n.3 (D. N.J. 1981), *aff'd,* 688 F.2d 204 (3rd Cir. 1982); and *United States v. Solvents Recovery Services of New England,* 496 F.Supp. 1127, 1138-39 (D. Conn. 1980).

14. Although the Act grants most of the substantive authority to the President, he has delegated these and other superfund implementation authority to the EPA, the Coast Guard, and various other agencies. Exec. Order No. 12316, 46 Fed. Reg. 42,237 (1981).

15. For a more thorough discussion of the general outline and financing mechanisms of CERCLA, *see Wade,* 546 F.Supp. at 792-93; *Reilly Tar & Chemical Corp.,* 546 F.Supp. at 1111-12; and *Stepan Chemical Co.,* 544 F.Supp. at 1142-43. *See generally* R. M. Hall, Jr., *The Problem of Unending Liability for Hazardous Waste Management,* 38 Bus. Law. 593, 600-01 (1983); J. Sachs, *Environmental Law & Practice,* Practicing Law Inst. (1982); *The Preemptive Scope of the Comprehensive Environmental Response, Compensation and Liability Act of 1980: Necessity for an Active State Rule,* 34 U.Fla.L.Rev. 635, 653 (1982); and Ekhardt, *The Unfinished Business of Hazardous Waste Control,* 33 Baylor L. Rev. 253 (1981). CERCLA, although nicknamed "the Superfund," is not the ultimate tool in dealing with the problems associated with inactive or aban-

doned hazardous waste sites as initially intended by its sponsors. CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. As will be noted below, numerous important features were deleted during the closing hours of the Congressional session. *Price*, No. 80-4104, slip op. at 11; *State ex rel. Brown v. Georgeoff*, 562 F.Supp. 1300, 1311 n.12 (N.D. Ohio 1983); *Reilly Tar & Chemical Corp.*, 546 F.Supp. at 1111-12; and *Stepan Chemical Co.*, 544 F.Supp. at 1142 and n.9. *See generally* Ekhardt, *The Unfinished Business of Hazardous Waste Control*, 33 Baylor L.Rev. 253 (1981). The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.

16. [Section 106] authorizes the Administrator to take emergency actions to protect public health or the environment whenever he receives evidence that the release of hazardous waste from an inactive site presents or may present an imminent and substantial danger to public health or the environment, or that there is a substantial threat of such a release.... The Committee intends this standard to be a flexible one....

H.R. Rep. No. 1016, 96th Cong., 2d Sess. 27-28, *reprinted in* [1980] U.S. Code Cong. & Ad. News at 6130-31. Congress spoke frequently of section 106(a) and its application in formulating equitable remedies to deal with inactive or abandoned sites that create imminent and substantial hazards.

17. The only decision narrowly construing section 106(a) is *United States v. Wade*, 546 F.Supp. 785 (E.D. Pa. 1982). In holding that section 106(a) does not apply to inactive sites, the court stated:

> In the absence of any evidence that Congress intended section 106 to be used in this way, and in fact of the clear and carefully detailed legislative provision of another route to

> the same result [sections 104 and 107(a)], I cannot agree with the government's contention.
>
> The language of section 106 gives no hint of an intent to confer liability on past generators. Like section 7003 of RCRA, and, significantly, unlike section 107, it is written in the present tense. It authorizes the government to seek immediate injunctive relief because of 'an actual or threatened release of a hazardous substance from a facility....' A straightforward reading of this language requires that I conclude that Congress intended section 106(a) to be used in emergency situations where hazardous waste was currently being discharged or threatened to be discharged 'from a facility' and where such discharge could be stopped by an injunction....

Id. at 793. Although this Court gave great deference to the *Wade* decision on other issues, the Court is of the opinion that the analysis in the *Wade* decision concerning section 106(a)'s application to inactive sites is inappropriate to Congressional intent. First, application of section 106(a) to inactive sites is not duplicative of sections 104 and 107(a). Section 106(a) is an emergency provision, not a general cleanup provisioni. Congress intended section 106(a) to be used when the normal route through sections 104 and 107(a) proved to be too time consuming and cumbersome in the face of an imminent and substantial endangerment. *See infra* note 28 and accompanying text. Second, section 106(a) grants broad flexible equitable powers to the court; whereas, sections 104 and 107(a) provide specific statutory remedies for costs incurred. Third, a restrictive comparison between section 7003 of RCRA and section 106(a) is misplaced because section 106(a) was drafted by a Congress enlightened by the hindsight of the inadequacies of section 7003's application to inactive sites and the magnitude of problems caused by these sites. CERCLA was specifically enacted to address the financial and procedural problems associated with inactive or abandoned sites. Fourth, in order to give full

effectiveness to CERCLA's provisions, section 106(a) must be allowed to work in tandem with sections 104 and 107(a). But for an expansive reading of section 106(a), the EPA would face similar financial problems as faced under section 7003 when abating an imminent and substantial endangerment. Finally, various other courts have declined to follow this portion of the *Wade* decision on similar grounds. *Price,* No. 80-4104, slip op. at 14-19; and *Outboard Marine,* 556 F.Supp. at 57-58. *See also Reilly Tar & Chemical Corp.,* 546 F.Supp. at 1113-14.

18. Defendants seek to distinguish the results in *Turner Elkhorn Mining Co.* from the case at bar. These arguments are unpersuasive. As previously noted, Congress explicitly intended CERCLA to apply retroactively is of little consequence. This Court fails to discern any concert difference in reimbursement of costs incurred by the government and compensation to black lung victims. Finally, there is no indication that strict liability under CERCLA is triggered only for the release of hazardous waste designated by the EPA. Section 101(14), 42 U.S.C. § 9601(14).

Promulgation of the hazardous waste listing by the EPA was not a prerequisite to the institution of this suit. *Reilly Tar & Chemical Co.,* 546 F.Supp. 1100, 1114-15 (D. Minn. 1982).

19. Section 4(n) of S.1480 read, in pertinent part, as follows:

> (n)(1) No person (including the United States, the Fund, or any State) may recover under the authority of this section, nor may any money in the Fund be used under Section 6 of this Act for the payment of any claim, for damages specified under subsection (a)(2)(A), (B), (C), (D), (G), or (E) (other than for loss resulting from personal injury of this section, nor may any money in the Fund be used under section 6(a)(1)(E) or (F) of this Act, where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

(2) No person (including the United States, the Fund, or any State) may recover under the authority of this section, nor may any payment of any claim, for damages specified under subsection (a)(2)(F) of this section (for loss of income or profits or impairment of earning capacity resulting from personal injury), where the exposure of the claimant to a release of a hazardous substance has occurred wholly prior to January 1, 1977, and the claimant has discovered or has knowledge of his injury or disease prior to such date.

(3) No person (including the United States, the fund, or any State) may recover under the authority of this section for damages specified under subsection (a)(2)(F) or this section or under subsection (a)(2)(E) of this section (for loss of income or profits or impairment of earning capacity resulting from personal injury), where the exposure of the claimant to a release of a hazardous substance has occurred wholly prior to January 1, 1977, but the claimant has not discovered or had knowledge of this injury or disease until after such date.

* * * *

(4) For the purpose of this subsection, the costs of temporary or permanent relocation of residences and provision of alternative water supplies shall be deemed costs of removal and not damages specified in subsection (a)(2)(A) of this section.

20. *See supra* note 15 and accompanying text.

21. *E.g.*, H.R.Rep. No. 1016, 96th Cong. 2d Sess., *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119; and S.Rep. No. 172, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. Code Cong. & Ad. News 5019.

22. *See Georgeoff*, 562 F.Supp. at 1312, citing statements by EPA representatives, S.Rep.No. 848, 96th Cong., 2d Sess. 98

(1980), and members of Congress, 126 Cong. Rec. S.15,00 (daily ed. Nov. 24, 1980)

23. Such was also the intent of Congress in passing CERCLA. *See* 126 Cong. Rec. S.14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph, then chairman of the Senate Environment and Public Works Committee); and 126 Cong. Rec. at H.11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio). The district court in *Price,* No. 80-4104, slip op. at 18, held that CERCLA requires a strict liability standard. *See generally Wade,* 546 F.Supp. at 793 n.24; *Conservation Chemical: Generator Liability For Imminent Hazards on the Docket,* 13 E.L.R. 10208, 10210 (1983); Note, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability The Answer to Superfund?,* 18 New Eng. L.Rev. 109, 128 (1982); and *Superfund: Conscripting Industry Support for Environmental Cleanup,* 9 Ecology L.Q. 524, 540-41 (1981).

24. *See supra* note 15 and accompanying text.

25. *See also* 126 Cong. Rec. Hll, 787 (daily ed. Dec. 3, 1980) (statement by Rep. Florio); and 126 Cong. Rec. S.14,967 (daily ed. Nov. 24, 1980) (statement by Sen. Stafford).

26. For a thorough discussion of the policy arguments favoring joint and several liability, *see* R. M. Hall, Jr., *The Problem of Unending Liability for Hazardous Waste Management,* 38 Bus. Law 593, 603-604 (1983); *conservation Chemical: Generator Liability for Imminent Hazards on the Docket,* 13 E.L.R. 10208, 10211-15 (1983); Note, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?,* 18 New Eng. L.Rev. 109 (1982); and Note, *Allocating the Costs of Hazardous Waste Disposal,* 94 Harv. L.Rev. 584 (1981).

As a subsidiary issue, defendants argue that the action must be dismissed for failure to join an indispensable party, James

Denney, owner of the Denney farm site, pursuant to Fed.R.Civ.P. 19. The Court finds this argument without merit. Neither RCRA, nor CERCLA, designate the landowner as an indispensable party. Although the Denney farm site is the subject matter of this suit, this Court finds that the defendants' interests were not prejudiced by the non-inclusion of Denney in this suit. Denney appeared and testified at trial for the plaintiff. The defendants had equal opportunity to make Denney a party, but chose not to do so. The Court also concurs with the statement found in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 5 (1st Cir. 1983). "Joint tortfeasors are not considered indispensible parties under federal law (citations omitted)."

27. *See supra* note 6 and accompanying text.

28. The only substantive legislative discussion of "imminent and substantial endangerment", as noted in *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1109-11 (D. Minn. 1982), is found in the House Committee Report accompanying section 1431 of the Safe Water Drinking Act; wherein, it is stated:

> '[I]mminence' must be considered in light of the time it may take to prepare administrative orders or moving papers to commence and complete litigation and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health.
>
> Furthermore, while the risk of harm must be 'imminent' for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.
>
> Among those situations in which the endangerment may be regarded as 'substantial' are the following:

> (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken;
> (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or
> (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants. . . .)

H.R.Rep. No. 1185, 93rd Cong., 2d Sess. 35-36, *reprinted in* [1974] U.S. Code & Cong. Ad. News 6454, 6487-88. This standard had been analyzed and summarized by various courts in applying emergency environmental statutes. *See United States v. Hardage,* No. 80-1031-W, slip op. at 3-4 (W.D. Olka. Dec. 2, 1980) (RCRA-"imminency of a hazard does not depend on the proximity of the final effect but may be proven by the setting in motion of a chain of events which could cause serious injury" (citation omitted)); *Environmental Defense Fund, Inc. v. Lamphier,* 12 E.L.R. 20843, 20844 (E.D. Va. 1982) (CERCLA-"There is no requirement that Protective measures be limited to actions taken after a crisis has arisen or a catastrophic disaster has struck," (citation omitted)); *United States v. Vertac Chemical Corp.,* 489 F.Supp. 870, 876 (E.D. Ark. 1980) (two factors must be considered in evaluating the request for relief: the toxicity of small concentrations of the substance and the likelihood that there will be human or environmental exposure); *Reserve Mining Co. v. EPA,* 514 F.2d 492, 529 (8th Cir. 1975) (en banc), *cert. denied,* 426 U.S. 941 (1976) (endangering the health or welfare of persons includes potential as well as actual harm); *Ethyl Corp. v. EPA,* 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc), *cert. denied,* 426 U.S. 942 (1976) ("endanger means something less than actual harm"); and *Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 597 (D.C. Cir. 1971) ("a hazard may be 'imminent' even if its impact will not be apparent for many years"). For a

thorough discussion of RCRA's section 7003 standard, "imminent and substantial," see *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies,* 9 Ecology L.Q. 599, 604-07 (1981).

29. An employee of a corporation can be personally liable for activities over which he had direct control and supervision. Defendant Lee, along with defendant Michaels, owned and operated the NEPACCO plant. Both were actively involved in the planning and implementation of NEPACCO's disposal practices. *See Escude Cruz v. Ortho Pharmaceutical Corp.,* 619 f.2d 902, 907 (1st Cir. 1980) (employee was the "guiding spirit" or "central figure" in the corporate activity); *Marks v. Polaroid Corp.,* 237 F.2d 428, 435 (1st Cir. 1956) (closely held corporation with officers who were both officers and shareholders); *Rohm and Haas Co. v. Dawson Chemical Co., Inc.,* 557 F.Supp. 739, 818-19 (S.D. Tex. 1983); and *Chanel Industries, Inc. v. Pierre Marche, Inc.,* 199 F.Supp. 748 (E.D. Mo. 1961).

From the language of the statute either an owner or operator or both can be held liable. In some circumstances these parties may be the same or separate and distinct persons.

30. *See Waste Industries,* 556 F.Supp. at 1316; *Georgeoff,* 562 F.Supp. at 1312 and the Congressional statements cited therein. *See also* H.R. 1016, *supra,* at 1, *reprinted in* [1980] U.S. Code Cong. & Ad. News at 6119.

31. *See supra* notes 29-30 and accompanying text.

This Court having found defendant Michaels liable pursuant to section 107(a)(1) does not deem it necessary to determine his liability pursuant to section 107(a)(3) as a "person" who arranged for the disposal of hazardous waste at the Denney farm site. Since Congress has determined that owners and operators of a facility from which hazardous waste are disposed are to be strictly liable, subject to only four defenses, the question of whether Michaels actually arranged for the disposal is moot.

32. *See Burgess v. M/V Tamano,* 564 F.2d 964, 993 (1st Cir. 1977), *cert. denied,* 435 U.S. 941 (1978); and *Commw. of Puerto Rico v. SS Zoe Colocotroni,* 456 F.Supp. 1327, 1347 (D. P.R. 1978), *aff'd,* 602 F.2d 12 (1st Cir. 1979), construing 33 U.S.C. §§ 1321(f)(1) and (2) of FWPCA, respectively, shall be liable to the United States for "the actual costs incurred", not to require a showing of reasonableness. *See also United States v. Beatty, Inc.,* 401 F.Supp. 1040, 1045 (W.D. Ky. 1975).

33. *See United States v. Hollywood Marine, Inc.,* 519 F.Supp. 688, 692 (S.D. Tex. 1981); and *United States v. Slade, Inc.,* 447 f.Supp. 638, 645 (E.D. Tex. 1978), construing "the actual costs incurred", 33 U.S.C. § 1321 of FWPCA, to include all salaries of the agencies' employees and expenses.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 80-5066-CV-S-4

United States of America,
Plaintiff,

vs.

Northeastern Pharmaceutical and
Chemical Company, Inc., et al.,
Defendants.

ORDER FOR FINAL JUDGMENT

This Court entered an order on January 31, 1984 granting judgment in favor of defendants on Count I of the amended complaint. The Court also ordered that upon the determination of the amounts which plaintiff is entitled to recover, judgment would be entered in favor of the plaintiff and against defendants on Counts II and III of the amended complaint. In addition, the Court granted the plaintiff's motion for declaratory relief and held that the defendants are jointly and severally liable for future costs of removal or remedial action incurred by the plaintiff relative to the Denney farm site that are not inconsistent with the national contingency plan. Plaintiff was allowed thirty days from the January 31st order in which to submit an itemization of the cost incurred by plaintiff after December 10, 1980. Finally, the plaintiff was awarded prejudgment interest of 9%, calculated from August 19, 1982. On March 2, 1984, the plaintiff filed an itemization of costs incurred after December 10, 1980 requesting that a judgment be entered against the defendants for $229,189.05. Specifically, the plaintiff showed that $139,814.54 had been incurred after December 10, 1980, and prior to October 1, 1983. The plaintiff requested costs

which were allegedly incurred by the plaintiff during the fiscal year 1983 for which documentary support was not available, nor presented, at the time of trial in the amount of $26,991.75. Plaintiff requested $44,104.21 for costs incurred for removal or remedial action incurred by the plaintiff relative to the Denney farm site from October 2, 1983 to March 2, 1984. Finally, the plaintiff has requested $18,278.55 in prejudgment interest from August 19, 1982 at 9%.

The defendant does not object to the government's itemization of costs incurred after December 10, 1980 and prior to October 1, 1983, in the amount of $139,814.54. The defendants contend that they can only be liable for the amount of damages proven and documented at trial. Specifically, the plaintiff would be unable to collect the $26,991.75 claim because there was no documentation at the time of trial for this Court to consider. In addition, the plaintiff is unable to collect the continuing cost of removal or remedial action, amounting to $44,104.21, because the defendants have not been given an opportunity to prove that these costs are inconsistent with the national contingency plan. The Court is of the opinion that defendants' arguments as to these two sets of itemized costs have merit. Consequently, the plaintiff, at this point, can only recover the specific amount proven at trial, that being $139,814.54. Presumably, the 9% interest was calculated on an amount which would be above the recoverable amount of damages. Therefore, the Court is unable to allow the prejudgment interest as calculated by the plaintiff to be $18,278.55.

Accordingly, for the above reasons, it is hereby

ORDERED that plaintiff is entitled to recover $139,814.54, as well as prejudgment interest in the amount of 115,357.39, calculated at 9% simple interest from August 19, 1982; and it is further

ORDERED that the Clerk of Court enter judgment in favor of plaintiff and against defendants on Counts II and III of the amended complaint, in the amount of $155,171.93.

Russell G. Clark, Chief Judge
United States District Court

Dated: April 16, 1984

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 80-5066-CV-S-4

United States of America,
Plaintiff,

vs.

Northeastern Pharmaceutical and
Chemical Company, Inc., et al.,
Defendants.

ORDER

Defendants filed a motion to alter or amend the judgment entered by this Court on April 16, 1984 finding the defendants liable to the plaintiff for certain costs incurred by the plaintiff in connection with its activities at the Denney Farm site. This action initially sought a judgment against the Syntex Agribusiness, Inc. On September 3, 1980, the United States and Syntex entered into a settlement agreement which resulted in a consent decree being issued by this Court. The defendants contend that the judgment entered against them on April 16, 1984 should be reduced by the sum of $100,000.00, the amount previously received by plaintiff in settlement of their claim against the Syntex Agribusiness, Inc. Upon due consideration, the Court finds that defendants' motion is without merit and should be denied.

Defendants cite in support of their position *Haley v. Byers Transporation Company,* 394 S.W.2d 412 (Mo. 1965); *Binson v. East Texas Motor Freight Lines,* 280 S.W.2d 124 (Mo. 1955); *McEwen v. Kansas City Public Service Company,* 19 S.W.2d 557 (Mo. App. 1929). The Court finds that these cases stand for

the proposition that a plaintiff is entitled to only one recovery and the amount paid by one codefendant is to be used in reducing or offsetting the judgment against the other codefendants. As noted in this Court's prior orders on June 11, 1981 and January 31, 1984 [reported at 579 F.Supp. 823, 831 n.2 (W.D. Mo. 1984)], the relief granted in the consent decree, pursuant to the settlement agreement between the United States and Syntex, did not concern the costs sought and recovered in the final judgment against the present defendants. The costs incurred and recovered by the plaintiff is an amount over and above the amount received from Syntex pursuant to the consent decree. The judgment entered on April 16, 1984 should not be reduced by the sum of $100,000, since the judgment against the defendants involve continuing and ongoing injury (costs), incurred by the plaintiff after December 10, 1980. Whether or not Syntex was actually obligated to enter into such a settlement agreement pursuant to CERCLA or RCRA is of little consequence to the actual measure of damages incurred by the plaintiffs and the amount of judgment against the defendants.

Accordingly, for the above reasons, it is hereby

ORDERED that defendants' motion to alter or amend the judgment of this Court entered April 16, 1984 is denied.

Russell G. Clark, Chief Judge
United States District Court

Dated: May 3, 1984

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 80-5066-CV-S-W-4

United States of America,
Plaintiff,

vs.

Northeastern Pharmaceutical and
Chemical Company, Inc., et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendants Northeastern Pharmaceutical and Chemical Company (hereinafter NEPACCO), Edwin Michaels and John Lee, hereby separately appeal to the United States Court of Appeals for the Eighth Circuit from the Memorandum Opinion of January 31, 1984, the Order for Final Judgment dated April 16, 1984 and the Order denying defendants' Motion to Alter or Amend the Judgment dated May 3, 1984.

ROBERTS, PERRYMAN &
BOMKAMP, INC.
By: Ted L. Perryman, #28410
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850

Attorney for Defendants,
NEPACCO, Michaels and Lee

6/28/84

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 80-5066-CV-S-4

United States of America,
Plaintiff,

vs.

Northeastern Pharmaceutical and
Chemical Company, Inc., et al.,
Defendants.

NOTICE OF CROSS-APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby cross-appeals to the United States Court of Appeals for the Eighth Circuit from the Court's Memorandum Opinion entered in this action on January 31, 1984.

DATED this 29th day of June, 1984.

ROBERT G. ULRICH
United States Attorney

By

VERNON A. POSCHEL
Assistant United States Attorney
549 United States Courthouse
811 Grand Avenue
Kansas City, Missouri 64106
(816) 374-2560

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have Power...[to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

2. Article I, Section 9 of the United States Constitution provides in relevant part:

> No Bill of Attainer or ex post facto Law shall be passed.

3. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall...be deprived of life, liberty or property, without due process of law....

4. The Seventh Amendment to the United States Constitution provides in relevant part:

> In Suits at common law...the right of trial by jury shall be preserved....

5. Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) ("CERCLA"), Pub. L. 96-510, 94 Stat. 2781 codified at 42 U.S.C. §9607(a) (1983) provides:

> Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

6. Section 7003 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended in 1980, Pub. L. 96-482, 92 Stat. 2348, codified at 42 U.S.C. §9673 (1980) provided:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial

endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person for contributing to the alleged disposal to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit.

7. Section 7003 of RCRA, as amended in 1984, Pub. L. 98-616, 98 Stat. 3271, codified at 42 U.S.C. §9607(a) (Supp. 1986) provides:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such

waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.